CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

October Term, 1944

No. 928

COMMISSIONER OF INTERNAL REVENUE,
PETITIONER

vs.

WILLIAM R. WEBSTER

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 28, 1944
CERTIORARI GRANTED DECEMBER 4, 1944

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 629

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

WILLIAM H. WEMYSS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

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1 Before United States Board of Tax Appeals

Docket No. 110419

WILLIAM H. WEMYSS, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appearances: For Taxpayer: Cecil Sims, Esq., James W. Allen, Esq. For Comm'r: Charles P. Bagley, Esq.

Docket entries

1942

Apr. 6—Petition received and filed. Taxpayer notified. Fee not paid.

Apr. 13—Copy of petition served on General Counsel.

Apr. 10—Fee paid—check.

June 2—Answer filed by General Counsel.

June 2—Request for hearing in Nashville, Tenn., filed by General Counsel.

June 5—Notice issued placing proceeding on Nashville, Tenn., calendar. Answer and request served.

1943

Feb. 18—Hearing set April 19, 1943—Nashville, Tennessee.

Apr. 20—Hearing had before Judge Mellott on the merits. Submitted. Appearance of James W. Allen. Pet's brief due 30 days. Respondent's brief due 30 days. Pet's reply brief due 15 days.

May 8—Transcript of hearing 4-20-43 filed.

May 19—Brief filed by taxpayer. 5-19-43 Copy served.

June 9—Memorandum brief filed by General Counsel. Served 6-10-43.

July 1—Motion for leave to file the attached amendment to petition, amendment lodged, filed by taxpayer.

July 1—Reply brief filed by taxpayer.

July 1—Motion for leave to file the attached amendment to petition—granted

July 1—Copy of reply brief served on General Counsel.

2 July 2—Copy of motion—amendment to petition served on General Counsel.

July 13—Answer to amendment to petition filed by General Counsel. 7-14-43 Copy served.

Oct. 14—Findings of fact and opinion rendered—Mellott, Judge, Div. 11. Decision will be entered for the respondent. 10-14-43 Copy served.

Oct. 14—Decision entered. Mellott, Judge, Div. 11.
Dec. 6—Petition for review by U. S. Circuit Court of Appeals, 6th Circuit, filed by taxpayer.
Dec. 6—Designation of contents of record filed by taxpayer.
Dec. 7—Notice of petition for review sent to J. P. Wenchel filed.
Dec. 8—Proof of service filed.

Before United States Board of Tax Appeals

Petition

(Filed April 6, 1942)

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency dated February 3, 1942, and as a basis for this proceeding alleges as follows:

1. Petitioner is a citizen of the United States of America and resides in the County of Davidson, State of Tennessee.

2. The notice of deficiency, a copy of which is attached hereto and marked Exhibit "A", was mailed to the taxpayer on February 3, 1942.

3. The taxes in controversy are gift taxes for the calendar years 1939 and 1940. No gift taxes were assessed against petitioner for the calendar year 1939 and the deficiency assessment for that year is $12,995.66. Petitioner was assessed with gift taxes for the calendar year 1940
3 in the sum of $1,657.44 and the deficiency assessment for that calendar year is $3,965.20.

4. The determination of taxes set forth in said notice of deficiency is based upon the following error:

The Commissioner erred in determining that the transfer on May 24, 1939, of 13,139 shares of the capital stock, common, of the General Shoe Corporation was a gift of an amount equal to the entire value of the stock transferred within the meaning of the Revenue Act of 1932 as modified by legislation enacted subsequent thereto.

5. The facts upon which petitioner relies as a basis for this petition are as follows:

The petitioner William H. Wemyss entered into a contract with Ellen Stokes More on or about May 24, 1939, in which the said Ellen Stokes More promised to marry the said William H. Wemyss on June 20, 1939, and petitioner agreed to transfer and deliver 13,139 shares of the common capital stock of the General Shoe Corporation to the said Ellen Stokes More to compensate her for the loss of certain monthly income under the terms of a trust being

administered by the Girard Trust Company of Philadelphia, Pennsylvania, and to maintain her during her lifetime in keeping with her station in life.

A copy of said agreement is filed herewith as Exhibit "B."

6. Wherefore the petitioner prays that the Board may hear this proceeding and may determine that the transfer on May 24, 1939, of 13,139 shares of the common capital stock of General Shoe Corporation was not taxable as a gift, and that the reported deficiency in the sum of $16,960.86 in gift tax liability for the calendar years 1939 and 1940 is erroneous, and that the notice thereof and the assessment of any tax thereon be set aside.

This the 3rd day of April 1942.

CECIL SIMS,
Attorney for Petitioner,
Cecil Sims,
1000 American Trust Building,
Nashville, Tennessee.

4 [*Duly sworn to by William H. Wemyss; jurat omitted in printing.*]

Exhibit A to petition

TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

NASHVILLE, TENNESSEE

FEBRUARY 3, 1942

Office of Internal Revenue Agent in Charge, Nashville Division.

MT-ET-CT-318-39-40-Tennessee—Donor—William H. Wemyss

Mr. WILLIAM H. WEMYSS,
% Mr. Cecil Sims,
Attorney,
1000 American Trust Bldg., Nashville, Tennessee.

DEAR SIR: You are advised that the determination of the gift tax liability of the above-named donor, disclosed a deficiency of $16,960.86, as shown in the statement attached, for the calendar years 1939 and 1940.

In accordance with the provisions of existing internal-revenue laws, notice is hereby given of the deficiency mentioned.

5 Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the United

States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to Internal Revenue Agent in Charge, Nashville, Tennessee, for the attention of MT-90-D. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully.

GUY T. HELVERING,
Commissioner.

By (Signed) N. F. RICHARDSON,
Internal Revenue Agent.

Enclosures:
Statement.
Form or waiver.
CBB/VEH.
MT-ET-GT-318-39-40-Tennessee.
Donor—William H. Wemyss.
Calendar years 1939 and 1940.

STATEMENT

	Liability	Assessed	Deficiency
Gift Tax, Year 1939	$12,995.65		$12,995.65
Gift Tax, Year 1940	5,622.64	$1,657.44	3,965.20

The deficiency results from the following adjustments:

Calendar year 1939

Schedule A.

6 Gift to Ellen Stokes More: 13,139 shares common stock of General Shoe Corporation $149,456.13.

Exclusions, returned 0, determined $4,000.00.

In view of the foregoing, your Federal Gift Tax liability for the calendar year 1939 is finally determined as follows:

	Returned	Determined
Total gifts, 1939, other than charitable, public and similar gifts	0.00	$149,456.13
Less exclusions	0.00	4,000.00
Amount of gifts included	0.00	145,456.13
Less specific exemption	0.00	0.00
Net gifts, 1939	0.00	145,456.13
Tax on net gifts, 1939	0.00	12,995.65
Tax shown on return		0.00
Deficiency, 1939		12,995.65

It has been determined that the transfer on May 24, 1939, of 18,139 shares of the capital stock, common, of the General Shoe Corporation was not made for a consideration in money or money's worth, and that the said transfer constituted a gift of an amount equal to the entire value of the stock transferred.

Calendar year 1940

The deficiency results from the following adjustments:
MT-ET-GT-318-39-40-Tennessee
Donor—William H. Wemyss
Calendar years 1939 and 1940.

STATEMENT, CONTINUED

	Returned	Determined
Total gifts, 1940, other than charitable, public and similar gifts	$84,090.12	$84,090.12
7 Less exclusions	4,000.00	4,000.00
Amount of gifts included	80,090.12	80,090.12
Less specific exemption	40,000.00	40,000.00
Net gifts, 1940	40,090.12	40,090.12
Net gifts for preceding years	0.00	145,456.13
Total net gifts	40,090.12	185,546.25
Tax on total net gifts	1,506.76	18,107.15
Tax on net gifts for preceding years	0.00	12,995.66
Tax on net gifts, 1940, without addition of defense tax	1,506.76	5,111.49
Defense tax	150.68	511.15
Total tax payable, 1940	1,657.44	5,622.64
Tax shown on return		1,657.44
Deficiency, 1940		3,965.20

The deficiency for 1940 results from the determination that the amount of net gifts for preceding years is $145,456.13, rather than none, as shown in your return.

Accordingly, your Federal Gift Tax liability for the calendar year 1940 is finally determined as shown above.

Before United States Board of Tax Appeals

Answer

Filed June 2, 1942

Comes now the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed in this proceeding, admits and denies as follows:

8 1, 2, and 3. Admits the allegations contained in paragraphs 1, 2 and 3 of the petition.

4. Denies that the Commissioner erred as alleged in paragraph 4 of the petition.

5. Denies the allegations contained in paragraph 5 of the petition.

Denies generally and specifically each and every material allegation not hereinbefore admitted or denied.

Wherefore, it is prayed that the petitioner's appeal be denied and that the Commissioner's determination be affirmed.

(Signed) J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue.

Of Counsel:
FRANK M. THOMPSON, Jr.,
Division Counsel,
JOHN R. STIVERS,
Special Attorney,
Bureau of Internal Revenue.

JRS/vhk.
5/28/42.

In the Tax Court of the United States

[Title omitted.]

Motion for amendment to petition

Filed July 1, 1943, Granted July 1, 1943

Comes petitioner, William H. Wemyss, and moves the Court, pursuant to Rule 17, for leave to amend his petition by adding thereto the following additional Assignment of Error:

If Sections 501 and 503 of the Revenue Act of 1932 are construed to be applicable to the transfer upon which the deficiency
9 assessments were made, then said Sections 501 and 503 of said Revenue Act of 1932 will be wholly arbitrary and as so construed will violate the Fifth Amendment to the Constitution of the United States.

Petitioner avers that this amendment, if allowed, raises only a question of law and does not change or affect the contentions of the respective parties relating to the proof or the facts.

The question of law raised by the foregoing amendment was stated in the record by petitioner's counsel as one of its contentions (R., pp. 3–4), and no question was made by respondent as to petitioner's right to rely upon such insistence.

This application for amendment is made at this time because respondent did not question petitioner's right to make this insistence at the hearing although being fully advised that such was one of the insistences which petitioner would make, but raised this question for the first time in his memorandum reply brief.

Since petitioner does not question the substantive validity of the sections in question but only questions their validity in the event the Tax Court should construe these sections in accordance with his contentions and since these contentions are made for the first time in the respondent's reply brief, petitioner, out of the abundance of precaution, now moves for amendment accordingly.

Respectfully submitted,

J. W. ALLEN,
Third National Bank Bldg., Nashville, Tennessee.
CECIL SIMS,
1000 American Trust Bldg., Nashville, 3, Tennessee,
Attorneys for Petitioner.

10 STATE OF TENNESSEE,
County of Davidson.

Cecil Sims makes oath that he is one of the attorneys for petitioner, and that the foregoing motion for amendment is not made for the purpose of delay but in good faith and solely for the purpose of meeting a technical objection not relied on by the respondent at the hearing.

CECIL SIMS.

Sworn to and subscribed before me, this 29th day of June 1943.
[SEAL] MARY E. WOODALL,
Notary Public.

My Commission expires: Jan. 15, 1946.

In the Tax Court of the United States

[Title omitted.]

Amendment to petition

Lodged July 1, 1943

By leave of Court the petition in this cause is amended by adding thereto the following Assignment of Error:

If Sections 501 and 503 of the Revenue Act of 1932 are construed to be applicable to the transfer upon which the deficiency assessments were made, then said Sections 501 and 503 of said Revenue Act of 1932 will be wholly arbitrary and as so construed will violate the Fifth Amendment to the Constitution of the United States.

J. W. ALLEN,
Third National Bank Bldg., Nashville, Tennessee,
CECIL SIMS,
1000 American Trust Bldg., Nashville, 3, Tennessee,
Attorneys for Petitioner.

11 In the Tax Court of the United States

Answer to amendment to petition

Filed July 13, 1943

Comes now the respondent, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the amendment to the petition filed in this proceeding, denies the assignment of error contained therein.

Denies generally and specifically each and every material allegation not hereinbefore admitted or denied.

Wherefore, it is prayed that the appeal be denied.

(Signed) J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue.

Of Counsel:
FRANK M. THOMPSON, Jr.,
Division Counsel,
CHARLES P. BAGLEY,
Special Attorney,
Bureau of Internal Revenue.

2 T. C. No. 111.

In the Tax Court of the United States

WILLIAM H. WEMYSS, PETITIONER, *v.* COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 110419

Findings of fact and opinion

Promulgated October 14, 1943

Pursuant to antenuptial agreement between petitioner and his intended wife, he transferred to her 13,139 shares of stock in consideration for her promise to marry him, and to compensate her for the loss of income under two trusts created by her former husband. Held:

1. The transfer was made for less than an adequate and
12 full consideration in money or money's worth and was subject to gift tax under section 503 of Revenue Act of 1932.

2. Marriage, as a consideration, is not measurable in money or money's worth and the amount taxable as a gift is the value of the property transferred.

3. Section 503, as construed, does not violate guaranty of due process of law under the Fifth Amendment to the Constitution.

4. The amount of the taxable gift may not be reduced by the value of the wife's interest in two trusts, lost by her upon her marriage to petitioner.

Cecil Sims, Esq., and James W. Allen, C. P. A., for the petitioner.

Charles P. Bagley, Esq., for the respondent.

Respondent determined deficiencies in gift tax in the amount of $12,995.66 for the calendar year 1939 and $3,965.20 for 1940. The issue is whether the transfer on May 24, 1939, by petitioner to his prospective bride of 13,139 shares of common stock of General Shoe Corporation, having a value of $149,456.13, constituted a taxable gift.

Findings of fact

Petitioner is a resident of Davidson County, Tennessee. On January 1, 1919, he married Helen Peters. She died on April 1, 1934, leaving two children surviving. On June 20, 1939, petitioner married Ellen Stokes More, a widow.

The former husband of petitioner's second wife, E. L. More, died on February 9, 1934, leaving one son surviving. Prior to his death, E. L. More executed two trust indentures, one on June 6, 1927, and one on June 15, 1929, naming the Nashville Trust Company as trustee. The corpus of the first trust was 650 shares of the capital stock of The Arcade Company, Nashville, Tennessee, and the corpus of the second trust was 20 shares of the capital stock of the same company. Each trust instrument pro-
13 vided that the entire net income of the trust estate should be paid to the grantor's widow during her lifetime or until her remarriage to be used for the maintenance and support of her and her son.

Ellen Stokes More was forty-four years of age on February 9, 1939. The amounts received by her from the trustee or successor trustee of the trusts referred to above from the date of the death of her husband until June 20, 1939 (the date of her marriage to petitioner) were as follows:

	June 6, 1927 trust	June 15, 1929 trust
1934 from February 9th	$9,222.45	$283.81
1935	11,934.14	337.25
1936	9,411.50	289.75
1937	9,253.32	285.00
1938	11,211.92	342.00
1939 to June 20th	6,972.10	214.54
	57,105.43	1,752.35

The trust instruments were construed to constitute separate and independent trusts for the grantor's widow and son. One-half of the above amount, or $29,428.89 was accordingly treated as received by the widow for her own use and an equal amount for the benefit of her child.

Some time prior to May 24, 1939, petitioner made a proposal of marriage to Ellen Stokes More. She told him she would not be willing to marry him and lose her life income under the trusts created by her first husband unless he would enter into a premarriage contract with her to make good the loss. On May 24, 1939, they entered into the following agreement:

This contract and agreement entered into by and between William H. Wemyss and Ellen Stokes More, both residents of Davidson County, Tennessee:

14 Witnesseth that:

Whereas, the said Ellen Stokes More has promised to marry William H. Wemyss on June 20, 1939; and,

Whereas, upon the consummation of said marriage, under the terms of a trust now being administered by the Girard Trust Company of Philadelphia, Pennsylvania, the said Ellen Stokes More will be deprived of a large monthly income; and

Whereas, it is the desire and intention of the said William H. Wemyss to compensate said Ellen Stokes More for her aforesaid loss and to provide for and maintain her so long as she may live in keeping with her station in life; and

Now, therefore, I William H. Wemyss, have this day transferred in blank and delivered to the said Ellen Stokes More thirteen thousand one hundred and thirty nine (13,139) shares of the common capital stock of the General Shoe Corporation evidenced by the following certificates:

Certificate No.	No. shares
6,001	472
6,495	231
844	900
840	1,000
839	1,000
837	9,536

In testimony whereof we, William H. Wemyss and Ellen Stokes More, have hereunto affixed our signatures.

This May 24th, 1939.

(Signed) William H. Wemyss.
(Signed) Ellen Stokes More.

This contract was recorded on June 21, 1939, in the Registrar's Office of Davidson County, Tennessee.

15 Petitioner transferred the 13,139 shares of General Shoe Corporation stock to Ellen Stokes More on May 24, 1939. Upon their marriage on June 20, 1939, the income she had been receiving for her own use under the trusts created by her first husband ceased and thereafter all of the income was paid to or for the benefit of her only child by her first husband. On the same date and immediately following the marriage petitioner executed a will, providing therein that his wife should have an estate for life or widowhood in a certain farm, and that one-third of his estate, less the value of 11,139 shares of common stock of General Shoe Corporation, should be held in trust for her.

Respondent determined that the transfer on May 24, 1939, of the 13,139 shares of General Shoe Corporation common stock was not made for a consideration in money or money's worth, and that the transfer constituted a gift of an amount equal to the value of the stock. He determined this value to be $149,456.13.

Opinion

MELLOTT, Judge: The sole issue is whether the transfer of the stock, the value of which is not controverted, constituted a taxable gift. The applicable provisions of the statute are shown in the margin.[1]

The parties agree that the transfer was made in consideration of the promise of marriage by petitioner's prospective wife and, as stated in the contract, to compensate her for the loss of income which she had been receiving under the trusts created by her first husband as well as "to provide for and maintain her for so

16 long as she may live in keeping with her station in life."

We agree with petitioner's contention that the agreement to marry constituted valuable consideration for the transfer, Prewit v. Wilson, 103 U. S. 22; Barnum v. Le Master, 110 Tenn. 638, 75 S. W. 1045; hence no taxable gift was made if only section 501 (a), supra, be considered. We pass at once, therefore, to the other contentions of the parties.

Section 503, supra, provides that where property is transferred for less than an adequate and full consideration in money or money's worth the amount by which the value of the property exceeded the value of the consideration shall, for the purpose of the

[1] SEC. 501. IMPOSITION OF TAX.
(a) For the calendar year 1932 and each calendar year thereafter a tax, computed as provided in section 502, shall be imposed upon the transfer during such calendar year by any individual, resident, or nonresident, of property by gift.
SEC. 503. TRANSFER FOR LESS THAN ADEQUATE AND FULL CONSIDERATION.
Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall, for the purpose of the tax imposed by this title, be deemed a gift, and shall be included in computing the amounts of gifts made during the calendar year.

tax imposed by the title, be deemed a gift and be included in computing the amount of gifts made during the year.[2] Respondent has construed the section as authorizing the inclusion of the entire value of property transferred for "a consideration not reducible to a money value, as love and affection, promise of marriage, etc."[3]

Petitioner contends that respondent's interpretation is erroneous. He argues that section 501 imposes an excise only upon the transfer of property by gift; that section 503 is applicable only where property is transferred for a monetary consideration less than its actual value or is exchanged for property of less value; that the latter section is subordinate to the former and is to be applied only where there is a plain attempt at evasion through
17 making a purported sale of property for less than its actual value; and that if section 503 be construed as taxing bona fide transfers for a valuable consideration it would be "contrary to the actualities * * *, unreasonably oppressive * * *, would arbitrarily ignore recognized rights to enjoy and convey individual property for a valuable and adequate consideration, and * * * violate the guaranty of due process of law * * *." Finally and in the alternative he urges that even if the promise of marriage be wholly disregarded there was nevertheless an adequate and full consideration in money or money's worth for the transfer in the legal detriment which the wife agreed to suffer in surrendering an annuity valued at $77,500. Therefore, he says, the gift made by him could not exceed the difference between that amount and the value of the stock, or $71,956.13.[3]

We are not persuaded that respondent has erred in his interpretation of section 503. The legislative history [4] indicates that Congress was endeavoring "to state with brevity and in general terms the provisions of a substantive character." Referring to some of the terms used—property, transfer, gift, etc.—it is said that

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[2] Articles 1 and 8 of Regulation 79 provide:

ART. 1.

* * * The tax is not limited in its imposition to transfers of property without a valuable consideration, which at common law are treated as gifts, but extends to sales and exchanges for less than an adequate and full consideration in money or money's worth (see Article 8) * * *

ART. 8.

Transfers reached by the statute are not confined to those only which, being without a valuable consideration, accord with the common law concept of gifts but embrace as well sales, exchange, and other dispositions of property for a consideration in money or money's worth to the extent that the value of the property transferred by the donor exceeds the value of the consideration given therefor. * * * A consideration not reducible to a money value, as love and affection, promise of marriage, etc., is to be wholly disregarded, and the entire value of the property transferred constitutes the amount of the gifts.

[3] The only evidence touching upon this phase is the wife's age—44 years—at the time of her marriage to petitioner and the income of the trusts. The $77,500, used by petitioner as the value of the right of Ellen Stokes More to receive for life one-half of the income of the trusts created by her first husband, is the result of a calculation under a table set out in respondent's regulations for the value of annuities. In making the calculation petitioner used the average annual income ($5,484) received by Mrs. More under the trust prior to her marriage to him.

[4] Senate report No. 665, 72d Cong., 1st Sess.; House Report No. 708, 72d Cong., 1st Sess.

they "are used in the broadest and most comprehensive sense." Cf. Robinette v. Helvering, 318 U. S. 184, and Smith v. Shaughnessy, 318 U. S. 176. There is nothing to indicate that Congress intended to make section 503 subordinate to section 501 or that it should be limited to instances where property is "sold or exchanged" for less than an adequate and full consideration in money or money's-worth as urged by petitioner. The fact that such words had been used in an earlier act (section 320, Revenue Act
18 of 1924) is unimportant. In our judgment Congress deliberately and intentionally chose to include, within the category of property to be taxed, not only that passing by a transfer which constituted a gift at common law but also all which was tranferred for less than an adequate and full consideration in money or money's worth. In other words, section 503 is supplementary to section 501. The conclusion which we have reached is supported not only the language of the act and the legislative history but also by the regulations which have been in effect without change for many years. (Articles 1 and 8, Regulations 79, supra. Cf. Articles 1 and 8, 1936 Edition approved February 26, 1936.) "Treasury Regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received Congressional approval and have the effect of law." Helvering v. Winmill, 305 U. S. 79; Waft v. Commissioner, 304 U. S. 351.

The only consideration received by petitioner for the transfer of the stock was the promise of marriage. While it, as pointed out above, is a valuable consideration it is not measurable in "money or money's worth." Prewit v. Wilson, supra. Cf. Central Union Trust Co., of New York et al., Executors, 24 B. T. A. 296. It is obvious, therefore, that "the amount by which the value of the property [transferred] exceeded the value of the consideration" equalled precisely the value of the property transferred. While the regulation states that a consideration not reducible to money value "is to be wholly disregarded" that is merely giving recognition to the fact that an attempt to make the calculation specified in the act would be nugatory.

The parties discuss at some length Commissioner v. Bristol, 121 Fed. (2d) 129, reversing Bennet B. Bristol, 42 B. T. A. 263. The issue in that case was whether certain properties and annuities transferred by petitioner to his wife upon marriage were gifts subject to tax. We concluded that Congress did not intend the interpretative restriction placed around the estate tax—(the amendment made by section 804 of the Revenue Act of 1932 to the estate tax law being declaratory of the law as it was prior thereto)
19 to apply to the gift tax law and that the relinquishment of

dower or other marital rights might, under the gift statute, be adequate and full consideration in money or money's worth. We pointed out that an arithmetical comparison of the value of the rights given up by the wife—relinquishment of her statutory rights in her husband's estate—with the value of the property received by her demonstrated that the transfer was full and adequate in money or money's worth. We have subsequently expressed our belief that the basic principle upon which decision was reached is sound (Herbert Jones, 1 T. C. 1207, 1209) and the District Court for the Southern District of Florida recently chose to follow it "rather than the contrary view set forth" in the opinion of the Circuit Court. Merrill v. Fahs, — Fed. Supp. —, (June 24, 1943, 43-2 U. S. T. C. 10061). But an attempt to apply it here could not aid petitioner; for no property or property rights of his prospective wife, vested, contingent or inchoate, were transferred by her to him. All that he received was her promise to marry him.

Petitioner's argument in support of his intention that the interpretation placed upon section 503 by the Treasury Department renders it unconstitutional is based largely on Helvering v. City Bank Farmers Trust Co., 296 U. S. 85. In that case the taxpayer urged that section 302 (d) of the Revenue Act of 1926 was unconstitutional, it providing that there should be included in the gross estate of a decedent the value at the time of his death of property transferred prior to death where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any other person, to alter, amend, or revoke the transfer. The court denied the contention, saying inter alia:

"* * * Congress may adopt a measure reasonably calculated to prevent avoidance of a tax. The test of validity in respect of due process of law is whether the means adopted are appropriate to the end. A legislative declaration that a status of the taxpayer's creation shall, in the application of the tax, be deemed the equivalent of another status falling normally within the scope of the taxing power, if reasonably requisite to prevent evasion, does not take property without due process. But if the means are unnecessary or inappropriate to the proposed end, are unreasonably harsh or oppressive, when viewed in the light of the expected benefit, or arbitrarily ignore recognized rights to enjoy or to convey individual property, the guarantee of due process is infringed."

Petitioner concedes that Congress has the power to classify, as taxable gifts, colorable transactions intended to evade the gift tax. He insists, however, that it may not tax a bona fide transfer for a valuable consideration, pointing out it is elementary the power to prevent evasions is to be reasonably exercised. The

premise is sound but the conclusion is nevertheless erroneous. The taxation as a gift of the transfer by a wealthy man of a substantial portion of his property to his intended spouse is, in our judgment, a reasonable exercise of the power to prevent evasions. Normally property so transferred will not be included in his gross estate in the absence of some affirmative act by the wife. Unless the tax is imposed when the transfer is made the excise upon the transfer will be altogether escaped. The gift tax and the estate tax are in pari materia and "an important, if not the main purpose of the gift tax was to prevent or compensate for avoidance of death taxes by taxing the gifts of property inter vivos which, but for the gifts, would be subject in its original or converted form to the tax laid upon transfers at death." Estate of Sanford v. Commissioner, 308 U. S. 39. It is reasonable to assume that Congress was aware of the fact that a transfer in consideration of marriage would not be a true gift since it would be based upon a valuable consideration. The fact that it chose language appropriate, under the Supreme Court decisions, to subject such a transfer to tax indicates that it was familiar with the court's interpretation and that it deliberately adopted the language for the purpose of closing the door against this method of escaping tax upon a transfer of property. In
21 this view it is immaterial that the transfer, as here, may not have been animated by a tax-saving motive. We believe that the regulations correctly interpret the law and that section 503 as thus construed does not violate the guaranty of due process of law under the Fifth Amendment to the Constitution.

Petitioner's alternative contention is that if section 503 be construed as applicable to the transfer made by him then the taxable gift must be limited to the excess of the value of the stock over the value of the interest in the income of the two trusts which his wife lost by reason of and upon her marriage to him.

Even if it be assumed that the loss by his wife of the income of the trusts was a consideration for the transfer of the stock rather than a mere consequence of the marriage, petitioner's contention must fail because he did not receive the income of the trusts or acquire any right thereto. All that he received was a promise of marriage which, as heretofore pointed out, is not measurable in money or money's worth. But he cannot prevail on this ground for other reasons. If it should be held that the taxable gift is to be computed as he suggests then he should have proved the actual value of the wife's interest under the trusts. Cf. John D. Archbold, 42 B. T. A. 453. The fact that the average income received by her during the period of her widowhood was at the approximate rate of $5,484 per annum is no assurance that the in-

come would thereafter continue at the same rate. Neither trust instrument gave her an annuity for life Each merely provided that she should have an aliquot part of the income, whatever it was. The corpus of each trust consisted of capital stock of the Arcade Company of Nashville, Tennessee. No evidence as to the financial condition of the company or of the assets owned by it was adduced.

Petitioner's argument that the "detriment" suffered by his wife was consideration for the transfer even though it did not result in any financial gain to him loses much of its force when it is kept in mind that the income, which she would have received under the trusts, inured wholly to her infant son. It may well be, though we make no holding to that effect, that her maternal in-
22 stinct prompted her to take the step which would give him double assurance of an adequate income for life.

Respondent in our judgment committed no error in determining the deficiencies in tax.

Reviewed by the Court.

Decision will be entered for the respondent.

Dissenting opinion

DISNEY, J., dissenting: Although perhaps, on the ground of failure of consideration, the ultimate conclusion of the majority opinion may be correct, the opinion is in large part based upon a concept to which I can not subscribe, that is, that section 503 of the Revenue Act of 1932 uses the word "consideration" as meaning consideration only to the donor, and may not be applied if the consideration consists only of detriment suffered by the donee. Neither in that section, nor elsewhere in the Revenue Act do I find the word "consideration" defined. I conclude, therefore, we should apply that meaning which has developed through centuries of experience in the civil and common law. That meaning, beyond controversy, includes detriment suffered by the promisee. Corpus Juris Secundum on Contracts, p. 425. It is true that Commissioner v. Bristol, 121 Fed. 129, contains language to the effect that section 503 provides that the transferor must receive consideration. The statute, however, does not so provide, but requires only that property be "transferred for less than adequate and full consideration," and if not, that the excess be deemed a gift. Property was transferred in this case for a consideration. Reasonable and realistic construction of the contract indicates clearly, I think, that the wife-to-be agreed to do two things, to wit, to marry petitioner and to forego her rights under a trust. The findings of fact recite that she told the petitioner that she would not marry him and lose her life income under the trust, unless he would enter into a pre-marriage contract with her to make good her loss.

In truth, the making good of the loss appears the principal element of the written agreement entered into. It was upon the representation and understanding that marriage would entail
23 such loss to his intended wife that the petitioner agreed to, and did, make the transfer; and if this representation had proved unfounded and she had in fact continued to receive, as before, the income under the trust, there would, in my opinion, have been partial failure of consideration for petitioner's transfer. Of course, the fact that it may not have represented full and adequate consideration goes only to the amount to be deemed gift. To the wife-to-be the detriment was consideration "in money or money's worth." The only point, then, is whether the consideration may be only to the promisee.

The Congressional Committee Reports covering section 503 of the Revenue Act of 1932, the same in both House and Senate, say that, "the tax is designed to reach all transfers to the extent that they are donative" and therefore that where the transfer is made for less than adequate and full consideration, the excess in value of property transferred over such consideration shall be deemed a gift. Patently, the object of the statute is to tax only so much of a transfer as is donative. This requires application of the usual concepts of gift and therefore of consideration. In my view, the language of section 510 of the same Revenue Act bears out this idea; for that section provides that the donee is personally liable for the gift tax, if not paid when due to the extent of the value of the gift. The majority opinion, therefore, subjects the petitioner's wife to the entire gift tax upon something for which she gave a very real consideration in money or money's worth, to some apparently considerable degree; for though the majority opinion holds that in any event the value of her interest in the trust was not proven, and obviously it was not fully proven, nevertheless, clearly it appears that it had no small monetary value. An interest in a trust which had for the last six years produced about $5,000 per year can hardly be denominated without money's worth. I find no reason, either in the words of the statute
24 or in the requirement of the situation sought to be covered by the statute, to desert the long respected concept of "consideration." Why not take the law as we find it? The statute, in my opinion, fairly and reasonably requires the application thereof and negatives intent to tax that portion of a transfer which as between the parties is covered by consideration in its usual and ordinary legal sense.

In the above nothing is said as to whether an agreement to marry is a consideration measurable in money, for the reason that the agreement to marry was only one of the considerations entering into the contract, and therefore it appears immaterial as to

whether marriage as consideration was pecuniarily measurable. The above conclusions, therefore, are based only upon the financial detriment suffered by the wife-to-be, as a consideration which in my opinion the law requires us to take into account. I therefore respectfully dissent.

[SEAL]

In the Tax Court of the United States

WILLIAM H. WEMYSS, PETITIONER *v.* COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 110419

Decision

Pursuant to the determination of the Court, as set forth in its Findings of Fact and Opinion, promulgated October 14, 1943, it is

Ordered and decided: That there are deficiencies in gift tax of $12,995.66 and $3,965.20 for the calendar years 1939 and 1940, respectively.

Enter:

(S) ARTHUR J. MELLOTT, *Judge*.

Entered Oct. 14, 1943.

25 In the Tax Court of the United States

WILLIAM H. WEMYSS, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket 110419

Statement of evidence

Filed May 8, 1943

Hearing at United States Court Room, United States Court House, Nashville, Tennessee, on the 20th Day of April 1943, at 3:00 O'Clock P. M.

REPORTER'S MINUTES

The above-entitled proceeding came on for hearing on this 20th day of April 1943, before the Honorable A. J. Mellott, Judge of the Tax Court of the United States, pursuant to notice of hearing heretofore given, whereupon the following proceedings were had, to wit:

Appearances

Cecil Sims (1000 American Trust Bldg., Nashville, Tenn.), and James W. Allen (1018 Third National Bank Bldg., Nashville, Tenn.), appearing for Petitioner.

Charles P. Bagley (Frank Nelson Bldg., Birmingham, Ala.), (Honorable J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue), appearing on behalf of the Commissioner of Internal Revenue, Respondent.

PROCEEDINGS

Judge MELLOTT. William H. Wemyss, Docket 110419. State your appearance, please.

Mr. SIMS. For the Petitioner, Cecil Sims, 1000 American Trust Building, Nashville, Tennessee.

Mr. ALLEN. Also for the Petitioner, James W. Allen, 1018 Third National Bank Building, Nashville, Tennessee.

Mr. BAGLEY. Charles P. Bagley, for the Respondent.

26 Judge MELLOTT. I believe that Mr. Sims is the only one that has filed an appearance in the case.

Mr. SIMS. That may be true.

Judge MELLOTT. You are admitted to practice, are you, Mr. Allen?

Mr. ALLEN. Yes, sir.

Judge MELLOTT. You may state the case for the Petitioner.

Mr. SIMS. You mean a summary of our position?

Judge MELLOTT. That is right.

Opening statement of Cecil Sims, attorney for petitioner

Mr. SIMS. Your Honor please, this case involves a deficiency gift tax which grows out of a certain contract between the Petitioner, Mr. Wemyss and Ellen Stokes More, which was a marriage contract under which the Petitioner contends thirteen thousand and some odd shares of common stock of the General Shoe Corporation, which were owned by the Petitioner, were transferred to Ellen Stoke More as a condition preceding, or in consideration of her agreement of marriage, the transfer taking place on May 24, 1939, pursuant to a written contract, which will be offered in evidence, the marriage thereafter being consummated on June 20, 1939.

It is the Petitioner's contention, first, that the transaction was not a transfer in the nature of a gift, but a transfer pursuant to a legal obligation under a written contract made in consideration of marriage, and that as a part of the transaction Ellen Stokes More, the other party to the contract, gave up a life income under two certain trusts created by her previous husband, E. L. More,

of which the Girard Trust Company, in Philadelphia, Pennsylvania, was the trustee; these trust instruments providing, in substance, that in the event of her remarriage her interest in the trust funds and the income therefrom would cease.

At the time of the marriage Ellen Stokes More was 44
27 years of age. The income accruing to her personally under the trust was averaging and had averaged for a number of years $450 per month.

The Petitioner will make two insistencies first, that the statute under which the gift tax is levied is an excise tax which is levied upon a substantive transaction known as a gift; that the section required denominating any transfer as a gift where the consideration received is not equal in money or money value, and requiring taxation as a gift to the extent of any difference is a statute which is wholly inequitable to a transaction of this nature and was intended to be confined only to an exchange of property where both parties were dealing in a business transaction, and there was a difference in the valuation of the properties.

It will also be contended that Congress has no constitutional power to bring within the classification of a gift any transaction except one of such a nature that it might be reasonably termed to be an evasion of the statute; that Congress cannot constitutionally declare a transaction as a gift unless it be in substance and in fact a gift, its power being limited to classifying transactions as gifts within the realm of the evasion periphery that extends around every substantive statute.

It will also be the Petitioner's position, somewhat in the alternative, that if the section relied on by the Government be applicable, then to the extent that Mrs. More gave up a life interest in a trust fund capitalized under the mortality tables applicable to a person of her age, under regulations 29 of the U. S. Treasury Department relating to the gift tax, and in particular Table A, the money or money value of the transfer is measurable by that sum, which would be approximately $84,000 as compared to an admitted value of some $149,000, which was the money value of the stock transferred.

Judge MELLOTT. State the case for the Respondent.

Opening statement by Mr. Bagley, Attorney for respondent

Mr. BAGLEY. The Respondent contends this was a gift within the meaning of Sections 501 and 503 of the Revenue
28 Act of 1932, and that the only consideration flowing to the Petitioner for this transfer was a promise of marriage which he received from Mrs. More; in other words, all he gained

was a wife, and since that consideration is one which is not reduceable to money, the money's worth of the entire value of the stock transferred constitutes a taxable gift.

Judge MELLOTT. Call your witness, please.

Whereupon WILLIAM HATCH WEMYSS, the Petitioner, was called as a witness in his own behalf, and having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. SIMS:

Q. What is your name?—A. William Hatch Wemyss.

Q. You are the Petitioner in the present case?—A. Yes, sir.

Q. Where do you reside?—A. In Sumner County, Tennessee.

Q. How old are you?—A. 63.

Q. Will you state the date of your first marriage?—A. January 1, 1919.

Q. To whom were you married?—A. Helen Peters.

Q. Will you state when your first wife died?—A. April 1, 1934.

Q. How many children survived upon the death of your first wife?—A. Two children.

Q. Their names, please, and present ages?—A. Helen Margaret Wemyss, 19; William H. Wemyss, Jr., 17.

Q. When were you married to Ellen Stokes More?—A. June 20, 1939.

Q. Had she been previously married?—A. Yes, sir.

Q. To whom had she been previously married?—A. E. L. More.

Q. When did she marry Livingfield More?—A. June 9, 1925.

29 When did Mr. Livingfield More die?—A. February 9, 1934.

Q. How many children, if any, survived that marriage?—A. One son.

Q. His name?—A. Livingfield More, Jr.

Q. His age at the present time?—A. Sixteen.

Q. I will ask you to state whether or not you entered into any agreement with Ellen Stokes More, the widow of E. L. More, deceased, prior to her consent to marry you?—A. I did.

Q. If so, will you please state the circumstances leading up to the agreement and the agreement itself?—A. She told me she would not be willing to marry me and lose her life income unless I gave her a premarriage contract and made it good.

Q. State whether or not she required as a condition to her consent to marriage to you a written obligation on your part to transfer to her sufficient securities, the income from which would make up the loss which she would sustain as a result of her marriage.

Mr. BAGLEY. I think that the question is a little leading.

Judge MELLOTT. Yes; it is a little leading.

Mr. SIMS. I was assuming there was really no dispute, but I reframe it.

Judge MELLOTT. Very well.

Mr. SIMS. Please read the last question and answer.

(Question and answer read.)

By Mr. SIMS:

Q. Did she require that as a condition precedent to her consent to marriage?—A. Yes, sir.

Q. Did you enter into a contract with her pursuant to that condition?—A. I did.

Q. State whether or not you agreed with her as to what securities were to be transferred?—A. Yes.

Q. What were they?—A. There were so many shares of General Shoe stock, common; 13,000 and some odd shares.

30 Q. State whether or not Mrs More, in addition to the written contract required the contract to be carried out by the actual transfer of the stock before the marriage took place?—A. Yes.

Q. What was the profession of Mrs. More's father?—A. A lawyer.

Q. Was the agreement which you have testified concerning prepared by Mr. Stokes, Mrs. More's father?—A. Yes, sir.

Q. And reduced to writing?—A. Yes, sir.

Q. Can you identify the document I hand you as a true copy of that agreement?—A. Yes.

Mr. SIMS. We offer the document for identification.

Judge MELLOTT. Is there any objection?

Mr. BAGLEY. No objection.

Judge MELLOTT. It will be received and marked for identification "Petitioner's Exhibit No. 1."

(Written agreement referred to, marked "Petitioner's Exhibit No. 1" and received in evidence.)

Mr. SIMS. That puts it in evidence?

Judge MELLOTT. That is right.

By Mr. SIMS:

Q. Before I forget it, Mr. Wemyss, how old was Ellen Stokes More at the time of her marriage to you?—A. 44.

Q. When was her forty fourth birthday?—A. On February 9, that year; 1939.

Q. Referring to Petitioner's Exhibit No. 1, the contract, state on what date the contract was executed by you and Mrs. More?—A. May 24, 1939.

Q. Where was it executed?—A. In her father's office.

Q. In the City of Nashville?—A. Yes, sir.

Q. That is his law office?—A. Yes, sir.

Q. Was it acknowledged before a Notary Public?—A. Yes, sir.

Q. After being acknowledged, state whether or not it was registered?—A. It was.

31 Q. In the register's office of Davidson County, Tennessee?—A. Yes, sir.

Q. The county in which Nashville is located?—A. Yes, sir.

Q. Mr. Wemyss, I will ask you if you can identify the document which I hand you as a certified photostatic copy of a certain trust indenture, dated June 6, 1927, between E. L. More, of River Falls, Alabama, and the Nashville Trust Company?—A. I can.

Q. Can you identify the document I hand you dated June 15, 1929, between E. L. More, of River Falls, Alabama, and the Nashville Trust Company?—A. Yes, sir.

Q. Can you state whether or not they constitute true copies, duly certified, of the two trust indentures, executed by E. L. More, the first husband of Ellen Stokes More, and the Nashville Trust Company, creating certain trusts, as set out in the instruments?—A. They do.

Q. Will you further state whether or not the Nashville Trust Company was subsequently succeeded by the Girard Trust Company of Philadelphia, Pennsylvania?—A. Yes, sir.

Mr. SIMS. We offer the two documents in evidence.

Mr. BAGLEY. No objection.

Judge MELLOTT. They may be handed to the clerk and marked "Petitioner's Exhibits Nos. 2 and 3" and received in evidence.

(Trust indentures, dated June 6, 1927, and June 15, 1929, between E. L. More of River Falls, Alabama, and the Nashville Trust Company, referred to, marked "Petitioner's Exhibits 2 and 3," and received in evidence.)

Mr. SIMS. I might say for the benefit of the record, Petitioner's Exhibit No. 2 creates a trust consisting of 650 shares of corporate stock known as the Arcade Company. The second trust indenture, to wit, Petitioner's Exhibit No. 3, is an identical trust that adds to the first trust 20 additional shares of the same stock. I say they are identical, because insofar as material to this controversy, the sections are identical as I have compared them.

32 There may be some differences not material to this controversy.

By Mr. SIMS:

Q. Now, for the benefit of the record, will you state whether or not under the terms of those two trust identures—of course, they speak for themselves, but to make the record coherent, Ellen Stokes More upon the death of her first husband was entitled to

receive during her lifetime or until her remarriage one half of the net income accruing under the trust estate?—A. She was.

Q. Mr. Wemyss, I will ask you if you have procured and have before you a complete statement from the Girard Trust Company?—A. Yes, sir.

Q. Showing the total funds distributed under the two trusts which have been made Petitioner's Exhibits 2 and 3?—A. Yes, sir.

Q. From February 9, 1934, through June 20, 1939, the first date being the date of the death of Mr. E. L. More, the last date being the date of the marriage of Ellen Stokes More to you?—A. Yes, sir.

Q. I will ask you if the income is divided first with respect to Petitioner's Exhibit No. 2, and second, with respect to Petitioner's Exhibit No. 3?—A. Yes, sir.

Q. Now, the total income shown on the document I am handing you, I believe, represents the total disbursements, and only one-half of that amount accrued to Ellen Stokes More; is that correct?—A. Yes, sir.

Mr. SIMS. I offer the document in evidence as Petitioner's Exhibit No. 4.

Judge MELLOTT. Is there any objection?

Mr. BAGLEY. No objection.

Judge MELLOTT. It may be received and marked "Petitioner's Exhibit No. 4."

(Statement from Girard Trust Company, Philadelphia, Pennsylvania, referred to, marked "Petitioner's Exhibit No. 4" and received in evidence.)

By Mr. SIMS:

Q. In order for the record to be coherent, at this point, Mr. Wemyss, I believe, under the two trust indentures,
33 the other half of the net income from the trust funds was for the benefit of Mrs. More's only child?—A. Yes, sir.

Q. And upon her death or remarriage, the one-half of the income which would otherwise have accrued to Mrs. More reverted to the benefit of this son?—A. That is correct.

Mr. SIMS. Now, if the Court please, although as I understand the rulings, the Tax Court takes judicial notice of the regulations of the U. S. Treasury Department, for the benefit of the record and the Court in considering the question, we would like to put in evidence Regulations 79 with regard to gift tax promulgated by the U. S. Treasury Department Bureau, of Nashville, containing——

Judge MELLOTT. I would suggest to counsel that it is wholly unnecessary that the document be put in evidence. We will take

judicial notice of it, and you may put into your brief whatever you want.

Mr. SIMS. Then it will not be offered. That is the Petitioner's case.

Judge MELLOTT. Cross-examine.

Cross-examination by Mr. BAGLEY:

Q. When you were discussing with Mrs. More the proposed marriage, did she request you to transfer to her any particular assets or money of any particular value?—A. Well, my assets were all in the form of General Shoe stock, so it had to be——

Q. Did she ask that you agree to transfer to her any particular number of shares?—A. We discussed that and agreed on it.

Q. You mean she suggested a certain number?—A. Yes, sir.

Q. And you suggested a certain number?—A. Yes, sir. She suggested a given number.

Q. How did it happen that the number came out to be an odd number like No. 13189?—A. The certificate is written up that way.

Q. You mean you had decided on a number close to that amount?—A. Yes, sir.

34 Q. At the time you were discussing the proposed marriage, were you familiar with the provisions of the two trust instruments which have been introduced in evidence?—A. Oh, yes.

Q. Did you have any knowledge of the amount of income that had been accruing to Mrs. More from that source?—A. Yes, sir.

Q. *Ddi* you know Mrs. More was entitled to only one-half of the income?—A. Yes.

Q. Did you know that in the event of her marriage all of the income would revert to her son, Livingfield More?—A. Yes, sir.

Q. I believe you testified you had two children who were living at the time of this marriage?—A. Yes, sir.

Q. Did you not, on the same date, or immediately following your marriage on the same date, execute your will?—A. Yes, sir.

Q. On June 30, 1939?—A. Yes, sir.

Q. I will ask you if in this will after leaving a certain farm to Mrs. Wemyss, after making provision for leaving her a farm for life or for widowhood, you then provided your estate should be divided into three parts?—A. Yes, sir.

Q. And in determining the part that would be left in trust for Mrs. Wemyss, you specified it would be reduced by the value of 11,139 shares of stock of the General Shoe Company?—A. Yes, sir.

Q. That being the same kind of stock which you transferred to her in connection with the marriage contract.—A. Yes, sir.

Mr. BAGLEY. That's all.

Mr. SIMS. That is all. That is our case.

(Witness excused.)

Judge MELLOTT. Is that all the evidence for the Petitioner?

Mr. SIMS. Yes, sir.

Judge MELLOTT. Is there any evidence for the Respondent?

35 Mr. BAGLEY. No, sir.

Judge MELLOTT. Do you gentlemen desire to file briefs?

Mr. SIMS. We would like to make copies of the Girard Trust Company letter and withdraw that for that purpose temporarily and return it to the clerk.

Judge MELLOTT. Exhibit No. 2?

Mr. SIMS. No, No. 4.

Judge MELLOTT. You may give her a receipt for it and withdraw it.

Mr. SIMS. On the question of brief, I believe this is a very interesting question of law, and we have prepared considerable memorandums on the brief. I would like 45 days, although, frankly, I don't expect to use that. It just so happens that our particular firm has been designated by the war effort to the extent of 50 per cent, and being the youngest member of the firm, my legs are more in demand than my head, and, consequently, I may have to take 45 days, although I don't expect to; in fact, I expect to take only about ten days.

Judge MELLOTT. What do you say for the Respondent? Can you file your brief also within 45 days?

Mr. BAGLEY. I would like to have as long as your Honor will permit.

Mr. SIMS. Make it 30 days.

Judge MELLOTT. I think briefs can be filed within 30 days for the Petitioner and 30 days thereafter for Respondent, and 15 days for the filing of reply brief. That will be the order.

(Hearing concluded.)

Petitioner's Exhibit 1

This contract and agreement entered into by and between William H. Wemyss and Ellen Stokes More, both residents of Davidson County, Tennessee;

36 Witnesseth that:

Whereas, the said Ellen Stokes More has promised to marry William H. Wemyss on June 20, 1939; and,

Whereas, upon the consummation of said marriage, under the terms of a trust now being administered by the Girard Trust Company of Philadelphia, Pennsylvania, the said Ellen Stokes More will be deprived of a large monthly income; and,

Whereas, it is the desire and intention of the said William H. Wemyss to compensate said Ellen Stokes More for her aforesaid loss and to provide for and maintain her so long as she may live in keeping with her station in life; and

Now therefore, I, William H. Wemyss, have this day transferred in blank and delivered to the said Ellen Stokes More thirteen thousand one hundred and thirty nine (13,139) shares of the common capital stock of the General Shoe Corporation * * * evidenced by the following certificates:

Certificate No.	No. shares
6,001	472
6,495	231
844	900
840	1,000
839	1,000
837	9,536

In testimony whereof we, William H. Wemyss and Ellen Stokes More, have hereunto affixed our signatures.

This May 24th, 1939.

WILLIAM H. WEMYSS,
ELLEN STOKES MORE.

STATE OF TENNESSEE,
County of Davidson.

Personally appeared before me, Caskey Knott, a Notary Public in and for said County and State, the within-named
37 bargainors William H. Wemyss and Ellen Stokes More with whom I am personally acquainted, and who acknowledged that they executed the within instrument for the purposes therein contained.

My commission expires on the 7th day of January 1941.

Witness my hand and seal this May 24, 1939.

CASKEY KNOTT, *Notary Public.*

The foregoing instrument was recorded on June 21, 1939, in the Register's Office of Davidson County, Tennessee, book 1037, page 577.

Petitioner's Exhibit 2

Certified Copy. No. 19419. Recorded Oct. 7/1927. 5956.

E. L. MORE,
To Trust Agree,
Nash. Trust Co. Trustee.

This agreement executed this 6th day of June 1927, by and between E. L. More of River Falls, Alabama, hereinafter referred to as the Grantor, and the Nashville Trust Company, a corporation organized and existing under the laws of the State of Tennessee

with its principal place of business at Nashville, Tennessee, hereinafter referred to as the Trustee; witnesseth:

I

For and in consideration of the sum of $1.00 paid by the Trustee, the receipt of which is hereby acknowledged, and the agreement of the Trustee to perform the duties hereinafter imposed upon it, the Grantor does hereby transfer, assign, convey and de-
38 liver unto the Trustee for the uses and trusts hereinafter set forth, the following described property, to wit:

Six Hundred and Fifty (650) Shares of the Capital Stock of The Arcade Company, Nashville, Tennessee, evidenced by Stock Certificate No. 170.

II

The said Trustee shall hold the said property in trust in the manner and upon the terms, conditions, and limitations herein set out.

III

Said Trustee shall hold, manage and control the property constituting the corpus of said trust estate, and collect and receive the income arising therefrom.

IV

During the life of the said E. L. More the entire net income collected and received from said Trust Estate, is to be paid over to E. L. More to be used by him in his discretion for the support, maintenance, and education, and apportioned among the beneficiaries under this Trust mentioned or referred to in Subsections (a), (b), (c), (d), (e), and (f) of Section VIII hereof, or any one of them to the exclusion of any one or more of the other beneficiaries and in such proportions and in such manner as he deems proper.

The Trustee is and shall be fully discharged and released from any and all liability in respect to all disbursements made in accordance with the provisions of this Trust by the receipts given by the said E. L. More for sums paid to him.

V

After the death of the said E. L. More the Nashville Trust Company, Trustee, shall pay over the entire net income col-
39 lected and received from said Trust Estate to Ellen Stokes More if she be living, during the period of her life or until her remarriage or incapacity.

Said Ellen Stokes More to use said entire net income for her own support and maintenance and for the support, maintenance, and education of the children of the said E. L. More, and subject further to the conditions, diminutions, and limitations set out in this Instrument; and subject to the support, maintenance and education of the beneficiaries under this Trust as herein set out.

VI

After the death of E. L. More and after the death, marriage, or incapacity of the said Ellen Stokes More the entire net income collected and received from said Trust Estate is to be paid over to Rumsey Lewis if he be living at that time, to be used by him for the support, maintenance, and education of the beneficiaries under this trust as herein set out.

VII

If at that time, that is, after the death of the said E. L. More and at the death or marriage or incapacity of the said Ellen Stokes More, said Rumsey Lewis should not be living, then and in that event the Nashville Trust Company shall use said income for the support, maintenance, and education of the beneficiaries under this Trust, and dispose of the corpus of said property held in trust as herein set out, any surplus income to become a part of the corpus of this trust.

VIII

It is the intention of this instrument that these trusts shall be construed as separate and independent so as to provide a certain and sure income, subject to the provisions, conditions, and limitations hereinabove and hereinafter mentioned, for:

(a) The support, maintenance, and education of my child, Livingfield More, for his life.

(b) The support and maintenance of my wife, Ellen Stokes More during her life or until her remarriage, she to be entitled to a child's part.

(c) The support, maintenance, and education of any other children within the period herein set out, that I (E. L. More) may have; each of my children to take share and share alike.

(d) The support, maintenance, and education of my (E. L. More's) grandchildren or direct descedents within the period herein set out. But a grandchild or direct descendant is to take only after the death of his or her parent (the child of E. L. More); grandchildren or direct descendants to take the share of their deceased parent, and to participate in said share, share and share alike.

(e) In the event of the death of Livingfield More, and the death or marriage of my wife, Ellen Stokes More, and the death of all of my children without leaving surviving them a child or children (my grandchild or grandchildren or direct descendants) then and in that event said property is to be held in trust by the said Nashville Trust Company, Trustee, for my cousin and namesake, Livingfield More Frazer for his life, and for twenty-one years thereafter; when a distribution shall be made among his direct descendants, share and share alike.

F

But in the event that Livingfield More Frazer should not be then alive (at the happening of all of the events above mentioned in this paragraph (e), and is not survived by a child or children, or direct descendants, and in addition all of the other events above mentioned in this subsection (e) have occurred, then said property is to be held in trust by said Nashville Trust Company, Trustee, for the support and maintenance of Anita Lewis
41 Frazer, for her life, if she be living, or if she be dead for her heirs, as hereinafter set out.

IX

The income, and the proportionate parts thereof, from said property held in trust, for the separate and independent period of:

1. The life of my son, Livingfield More, who was born July 11, 1926.

2. The life or until the remarriage of Ellen Stokes More.

3. The life or lives of any other children that E. L. More may have.

4. For the grandchildren or direct descendants of E. L. More, who shall take the share of their parent would have taken if living, the share that their parent would have taken if living, the share that their parent would have taken to be divided equally among said deceased parent's children, shall be used as provided in this Instrument for the support, maintenance or education of the above-named beneficiaries (subject to the provisions of Section IV) to the exclusion of the beneficiaries mentioned or referred to in Subsections (e) and (f) of Section VIII above; and subject to the provisions of Section XIV.

X

After the death of the said E. L. More and in the event, and during the period, said income from said trust estate is paid

over to said Ellen Stokes More (the amount of said income to be paid over to said Ellen Stokes More to be subject however to diminution or diminutions of such sum or sums to be paid direct by said Nashville Trust Company, Trustee, to each one of the children of said E. L. More for the life of such child from
42 and after the time such child reaches the age of twenty-one years) and said Ellen Stokes More shall use the income paid over to her, or such parts as may be necessary, for her own support and maintenance, and for the support, maintenance, and education of the minor children of the said E. L. More.

The Trustee is and shall be fully discharged and released from any and all liability in respect to all disbursements made in accordance with the provisions of this Trust by the receipts given by the said Ellen Stokes More for sums paid to her.

XI

After the death of the said E. L. More and after the death or marriage of the said Ellen Stokes More, and in the event, and during the period, said income from said trust estate is paid over to Rumsey Lewis, said Rumsey Lewis shall use the entire income or such parts as may be necessary, for the support, maintenance, and education of the minor children of said E. L. More, if there are minor children at that time.

The amount of said income to be paid over to said Rumsey Lewis to be subject however to diminution or diminutions of such sum or sums to be paid direct by said Nashville Trust Company, Trustee, to each one of the children of said E. L. More for the life of such child from and after the time such child reaches the age of twenty-one years.

The Trustee is and shall be fully discharged and released from any and all liability in respect to all disbursements made in accordance with the provisions of this Trust by the receipts given by the said Rumsey Lewis for sums paid over to him, and any surplus income not drawn by him during any year shall become a part of the corpus of this trust.

XII

As each child of said E. L. More reaches the age of twenty-
43 one years, from and after that time, said Nashville Trust Company, Trustee, is to pay over to such child for life, direct, such proportionate part of said income that said child may be entitled to, computing such child's interest as follows:

(a) The total number of children surviving at the time of such distribution.

(b) The wife for the purpose of this computation to be considered as a child.

(c) The interest of the children of a deceased child to be computed at the share that the parent would have taken if living, shall be added together; the child reaching the age of twenty-one years to receive one of these parts of said income.

XIII

Upon the death of any child or descendant of E. L. More leaving surviving a child or children, the child or children of such deceased child or descendant of the said E. L. More shall take the share their parent s'ould have taken if living.

XIV

In the event that any of the separate and independent trusts herein created should fail, then and in that event the part of said income or corpus, as the case may be, of said trust property shall inure to the benefit of the remaining separate and independent trusts.

My wife, Ellen Stokes More, in no event however to receive for her own use a share in excess of one-half (½) of the net income from said property held in trust.

XV

Any and all stocks with voting power or powers held by the Trustee under this Trust are to be voted by the Trustee in accordance with a request in writing given by the said E. L. More during the life of the said E. L. More.

" After the death of the said E. L. More then and in that event said stocks are to be voted by the Trustee in accordance with a request in writing given by Rumsey Lewis if he be living at that time.

After the death of E. L. More and after the death of Rumsey Lewis, the Trustee in its discretion shall vote said stocks as it deems proper, provided however, that after the death of E. L. More and if and when and after Livingfield More reaches the age of twenty-one years, that said stocks shall be voted by said Trustee in accordance with a request in writing given by the said Livingfield More for his life; and in the event of the death of Livingfield More and if and when and after the next oldest male child of E. L. More reaches the age of Twenty-one years, that said stocks shall be voted by said Trustee in accordance with a request in writing given by the said male child, for his life.

XVI

At any time during the continuation of the trusts herein created, the said Trustee may sell all or any part of the property constituting the corpus of the same (except stock or interests or rights in the Arcade Company which shall not be sold but shall be held to be distributed among the beneficiaries hereunder at the termination of the trusts herein created and as hereinafter set out), and reinvest the proceeds of sale and take and hold the property purchased upon the same trusts, conditions, and limitations herein mentioned or referred to; Provided, however, that such sales and reinvestments during the life of the Grantor shall be made when and in the manner and upon such terms as he shall direct in writing. Provided, further, that after the death of the Grantor and during the life of Rumsey Lewis such sales and reinvestments shall be made when, and in the manner and upon such terms as he shall direct in writing with the written consent of both said Rumsey Lewis and the Grantor's wife, the said Ellen Stokes More, so long as said Ellen Stokes More remains a beneficiary under these trusts herein created.

45 Provided, further, that after the death of E. L. More and after the death of Rumsey Lewis and so long as Ellen Stokes More shall remain a beneficiary hereunder, her written consent for sales and reinvestments shall be required, except During the life of the Grantor, and Provided, Further, that after the death of the said E. L. More, the Grantor, and after the death of Rumsey Lewis and after Ellen Stokes More ceases to be a beneficiary hereunder, such sales and reinvestments shall be made when, and in the manner and upon such terms as the Trustee in its judgment may deem best; and Provided, further, that after the death of all of the above named, and if and when Ellen Stokes More ceases to be a beneficiary hereof, if Livingfield More has reached the age of twenty-one years, his consent in writing must be obtained for sales and reinvestments.

Provided, Further, that after the death of E. L. More, the Grantor, and after the death of Rumsey Lewis, and after Ellen Stokes More ceases to be a beneficiary hereunder, and if and when the oldest living male child of E. L. More reaches the age of twenty-one years, such sales and reinvestments shall be made by the Trustee only with the written consent of said male child.

If there is no living male child who has reached the age of twenty-one years, such sales and reinvestments shall be made when and in such manner and upon such terms as the Trustee in its judgment may deem best, but subject to all of the provisions of this Section.

XVII

The said Trustee shall not be required to make to any Court any report or reports of its conduct of any of the trusts herein created, all such reports being hereby expressly waived, but it shall render semi-annual statements to the respective beneficiaries herein named.

46

XVIII

In creating the trusts herein, the intention of the Grantor is to provide a certain and sure income for the maintenance and support of all of the beneficiaries thereof, and of each of them as herein directed; and each and every of the said beneficiaries shall have no power to anticipate, mortgage, assign, sell or in any way alienate either the corpus of the estate held in trust for them or any of them, or the income arising therefrom, during the continuation of the trusts; and neither said trust property nor any part thereof, either corpus or income, while the same is held in trust by the Trustee for the said beneficiaries, or any of them, shall be subject to execution of other legal process for any debt or liability any one or all of said beneficiaries may have contracted or incurred or may hereafter contract or incur.

XIX

The Grantor, may at any time during his life, remove the said Nashville Trust Company, as Trustee, under this instrument, or any successor Trustee, and appoint in its or his place and stead as such trustee, another and a new trustee, such removal and appointment to be made only by an instrument in writing executed by the Grantor and acknowledged by him before a Notary Public, and therafter delivered by him to the said Nashville Trust Company or to its successor, which shall thereafter put the same to record in the Register's Office for Davidson County, Tennessee; and such removal and appointment shall take effect only upon the qualification of the new trustee in the manner above provided. After such removal, appointment, and qualification, the old Trustee shall thereupon deliver to the new Trustee the trust property, executing such assignments and conveyances as shall be necessary to effectuate the transfer.

Upon the removal of any Trustee, and the appointment and qualification of another in its place and stead, as above provided, the succeeding Trustee shall take and hold the said trust property, and every part thereof, upon the same uses and trusts, and subject to the same terms, conditions, and limitations as the said trust property, and every part thereof was held by the former trustee.

46

XX

"The compensation of the Trustee, including its successors in trust," if any, shall be limited to a charge of Five percent (5%) on the income collected, and subject further to the provisions of Section XXIV thereof.

XXI

The Trustee joins herein in evidence of its acceptance of the trusts, and its agreement to perform the duties imposed by this instrument, and to acknowledge the receipt of the property herein described.

XXII

At the date of the execution of this Instrument, there is in being, the following beneficiaries:

1. Livingfield More, my son, born July 11, 1926.
2. My wife, Ellen Stokes More, born February 9, 1895.
3. My cousin and namesake, Livingfield More Frazer born December 20, 1915.
4. Anita Lewis Frazer, born October 20, 1885.
5. Children of Anita Lewis Frazer, names and ages as follows:

(1) Eugene Lewis Frazer, born May 27, 1906.
(2) James Stokes Frazer, born August 11, 1907.
(3) Lewis Frazer, born January 24, 1909.
(4) Washington Frazer, born September 6, 1910.
(5) Dudley Dunn Frazer, born September 7, 1912.
(6) Anita Lewis Frazer, born April 2, 1914.
48 (7) Livingfield More Frazer, born December 20, 1915.

This Trust shall terminate and a distribution of the corpus of said trust estate be made, twenty-one years after the death of the survivor of all of the above named, at which time the Trustee shall distribute the corpus of the said fund and any accumulations or additions thereto (subject to the sooner termination of these Trusts, as set out in Subsections (e) and (f) of Section VIII above), as follows:

1. To the direct descendants of E. L. More, share and share alike that may be living twenty-one years after the death of the survivor of all of the above-named in this Section XXII. Such distribution to be made subject to the provisions of Section XIII hereinabove and subsection 4 of Section IX hereinabove.

2. If there is no direct descendant of E. L. More then and in that event the corpus of said fund and any accumulations or additions thereto are to be distributed among the direct descendants of Livingfield More Frazer, share and share alike.

Such distribution among the descendants of Livingfield More Frazer to be governed by the same rules as set out in Section XIII hereinabove, and as set out in subsection 4 of Section IX hereinabove.

3. In the event there are no persons living in the classes above mentioned or referred to in subsection (1) and (2) above in this section, then and in that event said trust fund shall be distributed among the heirs of Anita Lewis Frazer.

Such distribution among the heirs of Anita Lewis Frazer to be governed by the same rules as set out in Section XIII hereinabove, and as set out in subsection 4 of Section IX hereinabove.

XXIII

The Grantor may at any time or times hereafter transfer,
49 assign, and convey additional property to the Trustee to be held in accordance with the terms of this agreement as though the same had been originally transferred, assigned, and conveyed hereunder.

XXIV

The compensation of the Trustee, including its successors in trust, if any, shall be limited to a charge on the income collected and at the following rates:

(a) So long as the corpus constituting the trust consists of Six Hundred Fifty (650) shares of the stock of the Arcade Company, the maximum charge shall not exceed Five Hundred ($500.00) Dollars per annum.

(b) In the event the income collected should not exceed Ten Thousand ($10,000.00) Dollars, then and in that event a charge of five (5) percent on income less than Ten Thousand ($10,000.00) Dollars.

(c) In the event that additional property is transferred, assigned, and conveyed to the Trustee to be held in accordance with the terms of this agreement as provided, in Section XXIII hereof, the compensation of the Trustee including its successors in trust, if any, shall be five (5) percent on amounts from One Thousand ($1,000.00) Dollars to Ten Thousand ($10,000.00) Dollars; two (2) percent on amounts from Ten Thousand ($10,000.00) Dollars to Twenty Thousand ($20,000.00) Dollars; one and one-half (1½) percent on amounts from Twenty Thousand ($20,000.00) Dollars to Thirty Thousand ($30,000.00) Dollars; and one (1) percent on all amounts over Thirty Thousand ($30,000.00) Dollars.

(d) In the event investments or reinvestments are made by the Trustee, on its sole responsibility, of any part of the property

held in trust, then and in that event the compensation of the Trustee shall be five (5) percent on the income collected from such investments or reinvestments.

XXV

In witness whereof, the Grantor, has hereunto set his
50 hand and the said Nashville Trust Company, the Trustee, has caused its name to be hereunto signed by its 1st Vice President and its corporate seal to be hereunto affixed and attested by its Secretary, the day and year first above written.

E. L. More,
Nashville Trust Company,
By Chas. Nelson,
1st Vice Pres.

[SEAL] Nashville Trust Company,
Nashville, Tenn.

Attest:
M. S. Webb, *Secretary.*

State of Tennessee.
County of Davidson, ss:

Personally appeared before me, H. French Brown, a Notary Public in and for said County and State, the within named E. L. More, the bargainor, with whom I am personally acquainted, and who acknowledged that he executed the within instrument for the purposes therein contained.

Witness my hand and official seal at Nashville, Tennessee, this the 28th day of June 1927.

[SEAL] H. French Brown
Notary Public.

My commission expires July 2, 1927.

H. French Brown, Notary Public. Com. Expires July 2, 1927. Davidson Co., Tenn.

51 State of Tennessee.
County of Davidson, ss:

Before me, French Brown, a Notary Public in and for the County and State aforesaid, personally appeared Charles Nelson and M. S. Webb, with whom I am personally acquainted, and who upon oath acknowledged themselves to be the Vice President and Secretary respectively of the Nashville Trust Company, Trustee, the within named bargainor, a corporation: and that they as such Vice President and Secretary, being authorized so to do, executed the foregoing Instrument for the purposes therein contained by signing the name of the corporation by Charles Nelson

as such Vice President and by attesting the same and affixing the corporate seal by M. S. Webb as such Secretary.

Witness my hand and official seal at Office at Nashville, Tennessee, this 28th day of June 1927.

[SEAL] H. FRENCH BROWN,
Notary Public.

H. French Brown, Notary Public. Com. Expires July 2, 1927. Davidson Co., Tenn. Received Sept 26/1927 at 10:54 A. M.

I, Ernest Parker, Register for Davidson County, hereby certify that the foregoing is a true and correct copy of the "Trust Agreement" from E. L. More to Nashville Trust Co., Trustee, as same appears of record in my office in book No. 778, page 16, witness my official signature at office this 9 day of Nov. 1932.

[SEAL] ERNEST H. PARKER,
Register of Davidson County.
By CATHERINE MCKINSTRY,
Deputy Register.

52 We hereby certify that the foregoing is a true & correct copy of the above Trust Agreement.

GIRARD TRUST COMPANY,
L. COATES,
Asst. Trust Officer.

Petitioner's Exhibit 3

[Copy.]

This agreement executed this 15th day of June 1929, by and between E. L. More of River Falls, Alabama, hereinafter referred to as the Grantor, and the Nashville Trust Company, a corporation organized and existing under the laws of the State of Tennessee with its principal place of business at Nashville, Tennessee, hereinafter referred to as the Trustee; witnesseth:

I

For and in consideration of the sum of $1.00 paid by the trustee, the receipt of which is hereby acknowledged, and the agreement of the trustee to perform the duties hereinafter imposed upon it, the grantor does hereby transfer, assign, convey and deliver unto the trustee for the uses and trusts hereinafter set forth, the following-described property, to wit:

Twenty (20) shares of the Capital Stock of The Arcade Company, Nashville, Tennessee, evidenced by Stock Certificate No. 174.

II

The said Trustee shall hold the said property in trust in the manner and upon the terms, conditions and limitations herein set out.

53 III

Said Trustee shall hold, manage and control the property constituting the corpus of said trust estate, and collect and receive the income arising therefrom.

IV

During the life of the said E. L. More the entire net income collected and received from said Trust Estate, is to be paid over to E. L. More to be used by him in his discretion for the support, maintenance, and education, and apportioned among the beneficiaries under this trust mentioned or referred to in Subsections (a), (b), (c), (d), (e), and (f) of Section VIII hereof, or any one of them to the exclusion of any one or more of the other beneficiaries and in such proportions and in such manner as he deems proper.

The Trustee is and shall be fully discharged and released from any and all liability in respect to all disbursements made in accordance with the provisions of this Trust by the receipts given by the said E. L. More for sums paid to him.

V

After the death of the said E. L. More, the Nashville Trust Company, Trustee, shall pay over the entire income collected and received from said trust estate to Ellen Stokes More if she be living, during the period of her life or until her remarriage or incapacity.

Said Ellen Stokes More to use said entire net income for her own support and maintenance and for the support, maintenance and education of the children of the said E. L. More, and subject further to the conditions, diminutions, and limitations set out in this Instrument; and subject to the support, maintenance and education of the beneficiaries under this Trust as herein set out.

VI

54 After the death of E. L. More and after the death, marriage or incapacity of the said Ellen Stokes More the entire net income collected and received from said trust estate is to be paid over to Rumsey Lewis if he be living at the time, to

be used by him for the support, maintenance and education of the beneficiaries under this trust as herein set out.

VII

If, at that time, that is, after the death of the said E. L. More, and at the death or marriage or incapacity of the said Ellen Stokes More, said Rumsey Lewis should not be living, then and in that event the Nashville Trust Company shall use said income for the support, maintenance, and education of the beneficiaries under this trust, and dispose of the corpus of said property held in trust as herein set out, any surplus income to become a part of the corpus of this trust.

VIII

It is the intention of this Instrument that these Trusts shall be construed as separate and independent so as to provide a certain and sure income, subject to the provisions, conditions, and limitations hereinabove and hereinafter mentioned, for:

(a) The support, maintenance, and education of my child, Livingfield More, for his life.

(b) The support and maintenance of my wife, Ellen Stokes More during her life or until her remarriage, she to be entitled to a child's part.

(c) The support, maintenance, and education of any other children within the period herein set out, that I (E. L. More) may have; each of my children to take, share and share alike.

(d) The support, maintenance and education of my (E. L. More's) grandchildren or direct descendants within the period herein set out. But a grandchild or direct descendant is to take only after the death of his or her parent (the child of E. L. More); grandchildren or direct descendants to take the share of their deceased parent, and to participate in said share, share and share alike.

(e) In the event of the death of Livingfield More, and the death of marriage of my wife, Ellen Stokes More, and the death of all my children without leaving surviving them a child or children (my grandchild or grandchildren or direct descendants) then and in that event said property is to be held in trust by the said Nashville Trust Company, Trustee, for my cousin and name sake, Livingfield More Frazer for his life, and for twenty-one years thereafter, when a distribution shall be made among his direct descendants, share and share alike.

(f) But in the event that Livingfield More Frazer should not be then alive (at the happening of all of the events above mentioned in this paragraph (e), and is not survived by a child or

children, or direct descendants, and in addition all of the other events above mentioned in this subsection (e) have occurred, then said property is to be held in trust by said Nashville Trust Company, Trustee, for the support and maintenance, of Anita Lewis Frazer, for her life, if she be living, or if she be dead for her heirs, as hereinafter set out.

IX

The income, and the proportionate parts thereof, from said property held in trust, for the separate and independent periods of:

1. The life of my son, Livingfield More, who was born July 11, 1926.

2. The life or until the remarriage of Ellen Stokes More.

3. The life or lives of any other children that E. L. More may have.

4. For the grandchildren or direct descendants of E. L. More who shall take the share their parent would have taken if living, the share that their parent would have taken to be divided equally among said deceased parent's children, shall be used as provided in this Instrument for the support maintenance or education of the above-named beneficiaries (subject to the provisions of Section IV) to the exclusive of the beneficiaries mentioned or referred to in Subsection (e) and (f) of Section VIII above; and subject to the provisions of Section XIV.

56

X

After the death of the said E. L. More and in the event, and during the period, said income from said trust estate is paid over to said Ellen Stokes More (the amount of said income to be paid over to said Ellen Stokes More to be subject however to dimunution or diminutions of such sum or sums to be paid direct by said Nashville Trust Company, Trustee, to each one of the children of said E. L. More for the life of such child from and diminution or diminutions of such sum or sums to be paid direct after the time such child reaches the age of twenty-one years) and said Ellen Stokes More shall use the income paid over to her, or such parts as may be necessary, for her own support and maintenance, and for the support, maintenance, and education of the minor children of the said E. L. More.

The Trustee is and shall be fully discharged and released from any and all liability in respect to all disbursements made in accordance with the provisions of this trust by the receipts given by the said Ellen Stokes More for sums paid to her.

XI

After the death of the said E. L. More and after the death or marriage of the said Ellen Stokes More, and in the event, and during the period, said income from said trust estate is paid over to Rumsey Lewis, said Rumsey Lewis shall use the entire income or such parts as may be necessary, for the support,
57 maintenance, and education of the minor children of said E. L. More, if there are minor children at that time.

The amount of said income to be paid over to said Rumsey Lewis to be subject however to diminution or diminutions of such sum or sums to be paid direct by said Nashville Trust Company, Trustee, to each one of the children of said E. L. More for the life of such child from and after the time such child reaches the age of twenty-one years.

The Trustee is and shall be fully discharged and released from any and all liability in respect to all disbursements made in accordance with the provisions of this Trust by the receipts given by the said Rumsey Lewis for sums paid over to him, and any surplus income not drawn by him during any year shall become a part of the corpus of this trust.

XII

As each child of said E. L. More reaches the age of twenty-one years, from and after that time, said Nashville Trust Company, Trustee, is to pay over to such child for life, direct, such proportionate part of said income that said child may be entitled to, computing such child's interest as follows:

(a) The total number of children surviving at the time of such distribution.

(b) The wife for the purpose of this computation to be considered as a child.

(c) The interest of the children of a deceased child to be computed at the share that the parent would have taken if living, shall be added together; the child reaching the age of twenty-one years to receive one of these parts of said income.

XIII

Upon the death of any child or descendant of E. L. More
58 leaving surviving a child or children, the child or children of such deceased child or descendant of the said E. L. More shall take the share their parent would have taken if living.

XIV

In the event that any of the separate and independent trusts herein created should fail, then and in that event the part of said

income or corpus, as the case may be, of said trust property shall inure to the benefit of the remaining separate and independent trusts.

My wife, Ellen Stokes More, in no event however to receive for her own use a share in excess of one-half (½) of the net income from said property held in trust.

XV

Any and all stocks with voting power or powers held by the Trustee under this Trust are to be voted by the Trustee in accordance with a request in writing given by the said E. L. More during the life of the said E. L. More.

After the death of the said E. L. More then and in that event said stocks are to be voted by the Trustee in accordance with *accordance with* a request in writing given by Rumsey Lewis if he be living at that time.

After the death of E. L. More and after the death of Rumsey Lewis, the Trustee in its discretion shall vote said stocks as it deems proper, provided, however, that after the death of E. L. More and if and when and after Livingfield More reaches the age of twenty one years, that said stocks shall be voted by said Trustee in accordance with a request in writing given by the said Livingfield More for his life; and in the event of the death of Livingfield More, and if and when and after the next oldest male child of E. L. More reaches the age of twenty-one years, that said stocks shall be voted by said Trustee in accordance with a request in writing given by the said male child, for his life.

59 XVI

At any time during the continuation of the trusts herein created, the said Trustee may sell all or any part of the property constituting the corpus of the same (except stock or interests or rights in the Arcade Company which shall not be sold but shall be held to be distributed among the beneficiaries hereunder at the termination of the trusts herein created and as hereinafter set out), and reinvest the proceeds of sale and take and hold the property purchased upon the same trusts, conditions, and limitations herein mentioned or referred to; provided, however, that such sales and reinvestment during the life of the Grantor shall be made when and in the manner and upon such terms as he shall direct in writing. Provided, further, that after the death of the Grantor and during the life of Rumsey Lewis such sales and reinvestments shall be made when, and in the manner and upon such terms as he shall direct in writing with the written consent of both said

Rumsey Lewis and the Grantor's wife, the said Ellen Stokes More, so long as said Ellen Stokes More remains a beneficiary under these trusts herein created.

Provided, further, that after the death of E. L. More and after the death of Rumsey Lewis and so long as Ellen Stokes More shall remain a beneficiary hereunder, her written consent for sales and reinvestments shall be required. Except during the life of the Grantor, and Provided, further, that after the death of the said E. L. More, the Grantor, and after the death of Rumsey Lewis and after Ellen Stokes More ceases to be a beneficiary hereunder, such sales and reinvestments shall be made when, and in the manner and upon such terms as the Trustee in its judgment may deem best; and provided, further, that after the death of all of the above named, and if and when Ellen Stokes More ceases to be a beneficiary hereof, if Livingfield More has reached the age of twenty-one years, his consent in writing must be obtained for sales and reinvestments.

60 Provided, However that after the death of E. L. More, the Grantor, and after the death of Rumsey Lewis, and after Ellen Stokes More ceases to be a beneficiary hereunder, and if and when the oldest living male child of E. L. More reaches the age of twenty-one Years, such sales and reinvestments shall be made by the Trustee only with the written consent of said male child.

If there is no living male child who has reached the age of twenty-one years, such sales and reinvestments shall be made when and in such manner and upon such terms as the Trustee in its judgment may deem best, but subject to all of the provisions of this Section.

XVII

The said Trustee shall not be required to make to any Court any report or reports of its conduct of any of the trusts herein created, all such reports being hereby expressly waived, but it shall render semiannual statements to the respective beneficiaries herein named.

XVIII

In creating the trusts herein, the intention of the Grantor is to provide a certain and sure income for the maintenance and support of all of the beneficiaries thereof, and of each of them as herein directed, and each and every of the said beneficiaries shall have no power to anticipate, mortgage, assign, sell or in any way alienate either the corpus of the estate held in trust for them or any of them, or the income arising therefrom, during the continuation of the trusts; and neither said trust property nor any

part thereof, either corpus or income, while the same is held in trust by the Trustee for the said beneficiaries, or any of them, shall be subject to execution or other legal process for any debt or liability any one or all of said beneficiaries may have contracted or incurred or may hereinafter contract or incur.

XIX

The Grantor may at any time during his life remove the
61 said Nashville Trust Company, as Trustee under this Instrument, or any successor Trustee, and appoint in its or his place and stead as such trustee, another and a new trustee, such removal and appointment to be made only by an instrument in writing executed by the Grantor and acknowledged by him before a Notary Public, and thereafter delivered by him to the said Nashville Trust Company or to its successor, which shall thereafter put the same to record in the Register's Office for Davidson County, Tennessee; and such removal and appointment shall take effect only upon the qualification of the new trustee in the manner above provided, after such removal, appointment, and qualification, the old Trustee shall thereupon deliver to the new Trustee the trust property, executing such assignments and conveyances as shall be necessary to effectuate the transfer.

Upon the removal of any Trustee, and the appointment and qualification of another in its place and stead, as above provided, the succeeding Trustee shall take and hold the said trust property, and every part thereof, upon the same uses and trusts, and subject to the same terms, conditions and limitations as the said trust property, and every part thereof, was held by the former trustee.

XX

The compensation of the Trustee, including its successors in trust, if any, shall be limited to a charge of five percent (5%) on the income collected, and subject further to the provisions of Section XXIV thereof.

XXI

The Trustee joins herein in evidence of its acceptance of the trusts, and its agreement to perform the duties imposed by this instrument, and to acknowledge the receipt of the property herein described.

XXII

At the date of the execution of this Instrument, there is in being, the following beneficiaries:

1. Livingfield More, my son, born July 11, 1926.

62 2. My wife, Ellen Stokes More, born February 9, 1895.

3. My cousin and namesake, Livingfield More Frazer, born December 20, 1915.

4. Anita Lewis Frazer, born October 20, 1885.

5. Children of Anita Lewis Frazer, names and ages as follows:

(1) Eugene Lewis Frazer, born May 27, 1906.

(2) James Stokes Frazer, born August 11, 1907.

(3) Lewis Frazer, born January 24, 1909.

(4) Washington Frazer, born September 6, 1910.

(5) Dudley Dunn Frazer, born September 7, 1912.

(6) Anita Lewis Frazer, born April 2, 1914.

(7) Livingfield More Frazer, born December 20, 1915.

This Trust shall terminate and a distribution of the corpus of said trust estate be made, twenty one years after the death of the survivor of all of the above named, at which time the Trustee shall distribute the corpus of the said fund and any accumulations or additions thereto (subject to the sooner termination of these Trusts, as set out in Subsections (e) and (f) of Section VIII above), as follows:

1. To the direct descendants of E. L. More share and share alike that may be living twenty-one years after the death of the survivor of all of the above named in this section XXII such distribution to be made subject to the provisions of Section XIII hereinabove and subsection 4 of Section IX hereinabove.

2. If there is no direct descendant of E. L. More then and in that event the corpus of said fund and any accumulations or additions thereto are to be distributed among the direct descendants of Livingfield More Frazer share and share alike.

Such distribution among the descendants of Livingfield
63 More Frazer to be governed by the same rules as set out in section XIII hereinabove, and as set out in subsection 4 of Section IX hereinabove. 3. In the event there are no persons living in the classes above mentionel or referred to in subsections (1) and (2) above in this section then and in that event said trust fund shall be distributed among the heirs of Anita Lewis Frazer.

Such distribution among the heirs of Anita Lewis Frazer to be governed by the same rules as set out in Section XIII hereinabove, and as set out in subsection 4 of Section IX hereinabove.

XXIII

The Grantor may at any time or times hereafter transfer, assign, and convey additional property to the Trustee to be held in accordance with the terms of this agreement as though the same had been originally transferred, assigned, and conveyed hereunder.

XXIV

The compensation of the Trustee, including its successors in trust, if any, shall be limited to a charge on the income collected and at the following rates:

(a) So long as the corpus constituting the trust consists of twenty (20) shares of the stock of the Arcade Company, the maximum charge shall not exceed five Hundred ($500.00) Dollars per annum.

(b) In the event the income collected should not exceed Ten Thousand ($10,000.00) Dollars, then and in that event a charge of five (5) percent on income less than Ten Thousand ($10,000.00) Dollars.

(c) In the event that additional property is transferred, assigned, and conveyed to the Trustee to be held in accordance with the terms of this agreement as provided in Section XXIII hereof, The compensation of the Trustee including its successors in trust, if any, shall be five (5) percent on amounts from One Thousand ($1,000.00) Dollars to Ten Thousand ($10,000.00) Dollars; two (2) percent on amounts from Ten Thousand ($10,000.00) Dollars to Twenty Thousand ($20,000.00) Dollars; one and
64 one half (1½) percent on amounts from Twenty Thousand ($20,000.00) Dollars to Thirty Thousand ($30,000.00) Dollars; and one (1) percent on all amounts over thirty thousand ($30,000.00) Dollars.

(d) In the event investments or reinvestments are made by the Trustee, on its sole responsibility, of any part of the property held in trust, then and in that event the compensation of the Trustee shall be five (5) percent on the income collected from such investments or reinvestments.

XXV

In witness whereof, the Grantor, has hereunto set his hand and the said Nashville Trust Company, the Trustee, has caused its name to be hereunto signed by its Vice President and its corporate seal to be hereunto affixed and attested by its Secretary, the day and year first above written.

(Signed) E. L. MORE (E. L. More),
Nashville Trust Company.

(Signed) By W. W. MCNEILLY,
Vice Pres.

Attest:

(Signed) M. S. WEBB, *Secretary.*

622032—44——4

STATE OF ALABAMA,
Covington County.

I, E. W. Arwood, a Notary Public in and for said County and State, hereby certify that E. L. More, whose name is signed to the foregoing instrument, and who is known to me acknowledged before me, of this day, that, being informed of the contents of the Instrument, he executed the same voluntarily, on the date the same bears date.

Given under my hand, this 15th day of June 1929.

E.W. ARWOOD, *Notary Public.*

My commission expires March 17, 1931.

65 STATE OF TENNESSEE,
County of Davidson.

Before me, H. French Brown, a Notary Public in and for the County and State aforesaid, personally appeared W. W. McNeilly and M. S. Webb, with whom I am personally acquainted, and who upon oath acknowledged themselves to be the Vice President and Secretary respectively of the Nashville Trust Company, Trustee, the within named bargainor, a corporation; and that they as such Vice President and Secretary, being authorized so to do, executed the foregoing instrument for the purposes therein contained by signing the name of the corporation by W. W. McNeilly as such Vice President and by attesting the same and affixing the corporate seal by M. S. Webb as such Secretary.

Witness my hand and official seal at office at Nashville, Tennessee, this 20th day of June 1939.

H. FRENCH BROWN, *Notary Public.*

My commission expires Jany. 30, 1932.

Rec'd Nov. 7, 1932, at 2:35 P. M.

I, Ernest Parker, Register for Davidson County, hereby certify that the foregoing is a true and correct copy of the Trust Agreement from E. L. More to Nashville Trust Co., Tr, as same appears of record in my office in book No. 717, page 549, witness my official signature at office this 9 day of Nov. 1932.

[SEAL]

ERNEST H. PARKER,
Register of Davidson County.
Signed By CATHERINE MCKINSTRY,
Deputy Register.

We hereby certify that the foregoing is a true and correct copy of the above Trust Agreement.

GIRARD TRUST COMPANY,
L. COATES,
Asst. Trust Officer.

66 *Petitioner's Exhibit 4*

GIRARD TRUST COMPANY
Chartered 1836
Broad & Chestnut Streets
PHILADELPHIA

James E. Gowen, President.

APRIL 17, 1943.

Deeds of Trust E. L. MORE,
Mr. W. H. WEMYSS,
General Shoe Company, Nashville, Tennessee.

DEAR MR. WEMYSS: In accordance with Mrs. Wemyss' request on the telephone this morning, we are sending you with this a list of the amounts paid to Mrs. Wemyss year by year from February 9, 1934, to June 20, 1939, the date of Mrs. Wemyss' marriage. This information has been taken from the periodical statements in the deeds of trust, copies of which have been sent to Mrs. Wemyss.

Deed of Trust dated June 6, 1927

1934 from February 9th	$9,222.45
1935	11,034.14
1936	9,411.50
1937	9,253.32
1938	11,211.92
1939 to June 20th	6,972.10
	57,105.43

Deed of Trust dated June 15, 1929

1934 from February 9th	$283.81
1935	337.25
1936	289.75
1937	285.00
1938	342.00
67 1939 to June 20th	214.54
	1,752.35

Trusting this is the information which Mrs. Wemyss requires and that if there is any further information needed you will not hesitate to call upon us, we are

Yours very truly,

W. L. CLEAVES, *Trust Officer.*

W. L. Cleaves/MJB.

In United States Circuit Court of Appeals for the Sixth Circuit

[Title omitted.]

Petition for review

Filed Dec. 6, 1943

Now comes William H. Wemyss by his attorney, Cecil Sims, and hereby petitions the United States Circuit Court of Appeals for the Sixth Circuit to review the decision entered by the Tax Court of the United States on October 14, 1943, ordering and deciding that there are deficiencies in gift tax of $12,995.66 and $3,965.20 for the calendar years 1939 and 1940, respectively. This petition for review is filed pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

The individual gift tax returns for petitioner for the calendar years 1939 and 1940, respectively, were filed with the Collector of Internal Revenue for the District of Tennessee, whose office is within the jurisdiction of the United States Circuit Court of Appeals for the Sixth Circuit.

(S) CECIL SIMS,
1000 American Trust Building,
Nashville 3, Tennessee.

68 In the United States Circuit Court of Appeals
for the Sixth Circuit

[Title omitted.]

Notice of filing petition for review

Filed Dec. 8, 1943

To J. P. WENCHEL, *Chief Counsel, Bureau of Internal Revenue.*

You are hereby notified that William H. Wemyss did, on the 6th day of Dec. 1943, file with the Clerk of The Tax Court of the United States, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the sixth Circuit, of the decision of this Court heretofore rendered in the above-entitled case. Copy of the petition for review as filed is hereto attached and served upon you.

Dated this 7th day of Dec. 1943.

(S) B. D. GAMBLE,
Clerk, The Tax Court of the United States.

Service of copy of petition for review acknowledged this 8th of Dec. 1943.

(S) J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue,
Attorney for Respondent.

69 In United States Circuit Court of Appeals for the Sixth Circuit

[Title omitted.]

Designation of contents of record on appeal

Filed Dec. 13, 1943

William H. Wemyss, Petitioner on Review, hereby designates the following portions of the record, proceedings and evidence to be contained in the record on appeal:

1. Docket entries of the proceedings before the Tax Court of the United States.

2. Pleadings before the Tax Court:

(a) Petition for redetermination of deficiency, including copy of notice of deficiency attached thereto and marked Exhibit "A";

(b) Answer of Commissioner;

(c) Motion for amendment to petition granted July 1, 1943;

(d) Amendment to petition filed pursuant to motion granted July 1, 1943;

(e) Answer of Commissioner to amendment to petition.

3. Findings of Fact and Opinion, including dissenting opinion of Disney, J., promulgated October 14, 1943.

4. Decision entered October 14, 1943.

5. Entire transcript of proceedings before the Tax Court of the United States at a hearing held at Nashville, Tennessee, April 20, 1943, including stenographic report of the evidence and all exhibits filed in the evidence in the course of the hearing, two copies of which are filed herewith.

6. Petition for review with proof of service of notice of filing of petition for review and service of copy of petition for review.

70 7. This designation.

(S) CECIL SIMS,
1000 American Trust Building,
Nashville 3, Tennessee,
Counsel for Petitioner.

I hereby certify that service has been made by mailing a copy of this praecipe to J. P. Wenchel, Esq., Chief Counsel, Bureau of

Internal Revenue, Washington, D. C. This 3rd day of December, 1943.

(S) CECIL SIMS,
Counsel for Petitioner.

[Clerk's certificate to foregoing transcript omitted in printing.]

72 In United States Circuit Court of Appeals, Sixth Circuit

Cause argued and submitted

June 1, 1944

Before HICKS, SIMONS, and MARTIN, JJ.

This cause is argued by Cecil Sims for Petitioner and by I. Henry Kutz for Respondent and is submitted to the court.

In United States Circuit Court of Appeals

Judgment

Entered July 24, 1944

On petition to review decision of the Tax Court of the United States.

This cause came on to be heard on the transcript of record from the Tax Court of the United States, and was argued by counsel.

73 On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the decision of the said Tax Court in this cause be and the same is hereby reversed.

74 In United States Circuit Court of Appeals,
Sixth Circuit

No. 9724

WILLIAM H. WEMYSS, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

On Petition to Review the Decision of the Tax Court of the United States

Opinion

Filed July 24, 1944

Before HICKS, SIMONS, and MARTIN, Circuit Judges.

MARTIN, Circuit Judge. This gift tax litigation stems from a prenuptial contract in writing, dated May 24, 1939, between the

petitioner, William H. Wemyss, and a widow, Mrs. Ellen Stokes More, whom he married on June 20, 1939. Sometime prior to the execution of the contract, petitioner made a proposal of marriage to Mrs. More. Here answer was that she would be unwilling to marry him and lose in consequence a life income provided for her "until her remarriage" under trust indentures executed by her deceased husband, E. L. More, unless petitioner would enter into a premarriage contract to make good her loss.

Petitioner agreed to meet her requirements, even to the detail of the securities to be transferred to her. Her father, who was a lawyer, prepared the premarriage contract with succinct legal documentation. The widow exacted that the contract be carried out by the actual transfer and delivery to her of the stocks described therein prior to the performance of the marriage ceremony. The premarriage contract designated the date for the ceremony and the parties consummated the marriage as scheduled.

The agreement recited that upon consummation of the marriage, Mrs. More would be deprived of a large month-
75 ly income, and that it was the desire and intention of the petitioner to compensate her for such loss and to provide and maintain her permanently in keeping with her station in life. The 13,139 shares of common stock of General Shoe Corporation which were transferred and delivered to Mrs. More on the date of the execution of the contract were described by certificate number. The contract was acknowledged by the two parties, and on the day following the marriage ceremony was recorded in the register's office of their resident county in Tennessee.

Immediately after the marriage, the petitioner executed a will, in which he provided that his wife should have a life estate during widowhood in a certain farm and that one-third of his estate, less the value of all except 2,000 shares of General Shoe Corporation stock already transferred, should be held in trust for her.

The corpus of the trust estate, in which the former Mrs. More lost her interest upon remarriage, consisted of 670 shares of stock in the Arcade Company of Nashville, Tennessee. The trust indenture executed by her first husband provided that the entire net income of the trust estate should be paid to her during her lifetime, or until her remarriage, for the maintenance and support of herself and their son. The trusts, however, were separate and independent trusts for the widow and for the son. From February 9, 1934, to June 20, 1939, Mrs. More had received $29,428.89 from the trusts created by her first husband, as income for her own use, and an equal amount for the use and benefit of her son.

At the time Mrs. More entered into the marriage contract with the petitioner, William H. Wemyss, she was 44 years of age and he was 59.

On this state of facts, the Commissioner of Internal Revenue determined that the transfer by petitioner to Mrs. More, on May 24, 1939, of the 13,139 shares of General Shoe Corporation stock, was not for a consideration in money or money's worth, and accordingly that the transfer constituted a gift of an amount equal to the value of the stock, which he determined to be $149,456.13. The United States Tax Court, one judge dissenting, upheld the commissioner in his determination of a tax deficiency against the petitioner upon that basis; and the taxpayer, by appropriate petition, has brought the case here for review.

The tax court conceded the correctness of petitioner's contention that the agreement to marry constituted a valuable consideration for the transfer of the stock. Prewit v. Wilson, 103 U. S. 22; Barnum 1. LeMaster, 110 Tenn. 638, 73 S. W. 1045. It was, therefore, declared that no taxable gift was made, if only section 501(a) of the Revenue Act were to be considered.[1]

76

But the tax court held that the transfer was made for less than an adequate and full consideration in money or money's worth and was therefore subject to gift tax under section 503 of the Revenue Act of 1932, which provides: "Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall, for the purpose of the tax imposed by this title be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year." Marriage, as a consideration, was deemed immeasurable in money or money's worth, and the value of the property transferred was held to be the amount taxable as a gift, not to be reduced by the value of the wife's interest in her first husband's trusts lost by her upon her marriage to petitioner.

The tax court construed section 503 of the Revenue Act as supplementary to section 501, and as manifesting the intention of Congress to include within the category of gift taxation not only a transfer which constituted a gift at common law but also a transfer of property for less than an adequate and full consideration in money or money's worth. A promise of marriage was not deemed by the court to be such consideration. Articles 1 and 8 of Treasury

[1] SEC. 501. Imposition of Tax.—(a) For the calendar year 1932 and each calendar year thereafter a tax, computed as provided in section 502, shall be imposed upon the transfer during such calendar year by any individual, resident or nonresident, of property by gift.

Regulations 79[2] were stressed as definitive and binding, especially in view of the repeated reenactment of the statute which these regulations construed. Helvering v. Winmill, 305 U. S. 79, and Taft v. Commissioner, 304 U. S. 351, were cited.

The tax court reasoned that, assuming the loss by the wife of the income from the trusts created by her first
77 husband was the consideration for the transfer to her of the Shoe Corporation stock "rather than a mere consequence of the marriage," the petitioner could not prevail for the reason that he acquired no right in or income from the trusts but received merely a promise of marriage, not measurable in money or money's worth. It was considered that the word "gift" must necessarily be construed in the broadest and most comprehensive sense. Robinette v. Helvering, 318 U. S. 184; Smith v. Shaughnessy, 318 U. S. 176.

The court pointed out that unless the gift tax should be imposed when the transfer was made, the excise upon the transfer would be "altogether escaped;" and that the gift tax and the estate tax are in pari materia, an important purpose of the former being to prevent or compensate for avoidance of death taxes by taxing gifts of property *inter vivos* which, except for the gifts, would be subject to the tax upon transfers at death. Estate of Sanford v. Commissioner, 308 U. S. 39. It was thought reasonable to assume that Congress, being aware that "a transfer in consideration of marriage would not be a true gift since it would be based upon a valuable consideration," deliberately adopted language with intent to close the door against "this method of escaping tax upon a transfer of property," even though the transfer, as concededly in the instant case, may not have been animated by a tax-saving motive. The treasury regulations were regarded as correctly interpreting the law; and, as so construed, section 503 was held, contrary to the contention of the petitioner, not to be violative of the Fifth Amendment to the Federal Constitution.

A further reason for rejecting the petitioner's claim for refund was found by the tax court in petitioner's failure to prove the actual value of his wife's interest under the trusts established by her first husband. Passing comment was made, moreover, that the interest in the trust estate surrendered by Mrs. More upon her

[2] ART. 1. * * * The tax is not limited in its imposition to transfers of property without a valuable consideration, which at common law are treated as gifts, but extends to sales and exchanges for less than an adequate and full consideration in money or money's worth (See Article 8). * * *

ART. 8. Transfers reached by the statute are not confined to those only which, being without a valuable consideration, accord with the common law concept of gifts but embrace as well sales, exchange, and other dispositions of property for a consideration in money or money's worth to the extent that the value of the property transferred by the donor exceeds the value of the consideration given therefor. * * * A consideration not reducible to a money value, as love and affection, promise of marriage, etc., is to be wholly disregarded, and the entire value of the property transferred constitutes the amount of the gifts.

marriage to petitioner inured entirely to the benefit of her infant son.

Inasmuch as we are not in accord with the decision of the tax court, due deference has caused our somewhat detailed narrative of its rounded viewpoint. To our thinking, the correct basis of decision here is simple. The record reveals in actuality no semblance of a premarriage gift of stock by the petitioner to his affianced. She bargained with him at arm's length before she cut herself off by remarriage from her interest in the trust estate created by her first husband. She sustained a very real and
78 substantial detriment as the consideration for her promise to marry the petitioner. This detriment was definitely measurable in money or money's worth. The circumstances that the money detriment which she sustained did not move to the benefit of petitioner except in the acquisition of the lady of his choice as wife does not lessen the business-like nature of the transaction. The tax court itself found no evidence of an actual donative intent upon the part of petitioner in transferring the stock.

We do not read section 503 of the revenue act as requiring its application to a case where a detriment, measurable in money or money's worth, suffered by the transferee does not inure to the benefit of the transferor in money or money's worth. True it is that Congress could tax a transfer whether or not made with donative intent; but when section 503 is construed as supplementary to section 501, as the tax court construed it and as we think it should be construed, the donative intent must exist in order to subject the transfer of the property to taxation as a gift. If Article 8 of Regulation 79 be interpreted as extending gift tax liability beyond the plain language of the statute, reenactments of the statute do not constitute an adoption by Congress of the administrative construction. See Busey, Collector of Internal Revenue v. Deshler Hotel Co., 130 F. (2d) 187 (C. C. A. 6), for full discussion.

But we do not regard Article 8 of Regulation 79 as applicable to the facts of this case. The transfer of the property involved herein was not for a consideration of a mere promise of marriage; the consideration for the transfer was not only a promise to marry but a concomitant surrender by the transferee of a life income in an existing trust fund.

It is idle to argue that any importance attaches to the fact that Mrs. More forfeited her interest in the trust fund of her first husband when she became Mrs. Wemyss and not when she promised to become Mrs. Wemyss. She kept her promise to become Mrs. Wemyss and thereby incurred the loss of her interest in the trust

fund. The detriment she suffered in money or money's worth was as real when viewed from the one time-point as from the other; and the consideration paid her was as valuable at the one time as at the other.

This case differentiates from those cases in which prospective husbands and wives have entered into prenuptial agreements as to the interest to be acquired by the lady in the property and estate of the gentleman. In these cases the prospective wife was
79 agreeing to surrender only herself to the bonds of matrimony without an accompanying surrender of any property owned by her. She was providing against the exigencies of matrimony by fixing a definite basis for her participation in the property or estate of the man she was about to marry. For example, see Commissioner of Internal Revenue v. Bristol, 121 F. (2d) 129 (C. C. A. 1).

Here the prospective wife was not contracting concerning the subject matter of her interest in the estate of the prospective husband. She was agreeing upon a present transfer made to indemnify her against loss of existing property rights which would ensue in consequence of her remarriage.

Furthermore, the Wemyss transfer is completely disassociated from any indicia of an intent to avoid or reduce death taxes. The minds of the contracting parties at the time of the transfer were obviously upon their future life together and not upon the effect of the transfer in the event of the death of either. In no aspect was the transfer made in contemplation of death.

Authorities pertaining to property settlements in relation to divorce bear no relevancy here and will not be cited or discussed.

This case is sui generis, easily and correctly justiciable upon simple grounds. Manifestly, there was no donative intent in the transfer sought to be taxed as a gift and the transfer itself was not a donative action, within the meaning of section 503 of the Revenue Act or any other sections of the Gift Tax Statute.

In view of our interpretation of section 503 in its relation to the instant controversy, it is unnecessary to consider the argument of petitioner that, should the statute be construed as arbitrarily taxing bona fide transfers for a valuable consideration when not in fact gifts nor intended or capable of being employed to evade the gift tax, the section would be violative of the Fifth Amendment to the Constitution of the United States. Heiner v. Donnan, 285 U. S. 312.

In our judgment, the law does not require that the difference in value between that which petitioner conveyed to his affianced and that which she surrendered in money or money's worth by marrying him be calculated and the excess value taxed under section 503. Compare Herbert Jones v. Commissioner, 1 Tax

Court 1207; Lasker v. Commissioner of Internal Revenue, 138 F. (2d) 989.

What she surrendered in good faith was of quite substantial value in money's worth and was a sufficiently real consider-
80 ation in money's worth to negative a gift-motive concept in the excess in value of the property transferred. We are not in accord with the opinion expressed by the majority of the Court of Appeals for the Ninth Circuit in Commissioner of Internal Revenue v. Greene, 119 F. (2d) 383, 386. We find the reasoning in Lasker v. Commissioner of Internal Revenue, supra, more congenial to our own views. This court has previously expressed, in the language of Judge Hamilton, its concept of the meaning of the word "gift" in the revenue statutes. Commissioner of Internal Revenue v. Montague, 126 F. (2d) 948, 951 (C. C. A. 6).

A donative intent followed by a donative act is essential to constitute a gift; and no strained and artificial construction of a supplementary statute should be indulged to tax as a gift a transfer actually lacking donative intent.

The decision of the Tax Court is reversed.

81 [Clerk's certificate to foregoing transcript omitted in printing.]

82 Supreme Court of the United States

Order allowing certiorari

Filed December 4, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted. The case is transferred to the summary docket and assigned for argument immediately following Merrill vs. Fahs, U. S. Collector of Internal Revenue, No. 126.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] File No. 49082. U. S. Circuit Court of Appeals, Sixth Circuit. Term No. 629. Commissioner of Internal Revenue, Petitioner vs. William H. Wemyss. Petition for a writ of certiorari and exhibit thereto. Filed October 23, 1944. Term No. 629 O. T. 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1944